123-527

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

~~No. 311.~~ 66

THE NEW YORK, LAKE ERIE & WESTERN RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

GEORGE R. MADISON.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

FILED OCTOBER 6, 1884.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. 344.

THE NEW YORK, LAKE ERIE & WESTERN RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

GEORGE R. MADISON.

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JUDD & DETWEILER, PRINTERS, WASHINGTON.

1

Writ of Error.

No. 4228.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the northern district of Ohio, eastern division, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you, the judges aforesaid, between George R. Madison, as plaintiff, and The New York, Lake Erie and Western Railroad Company, as defendant, a manifest error hath happened, to the great damage of the said The New York, Lake Erie and Western Railroad Company, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of
2 the said Supreme Court, the 22nd day of July, in the year of our Lord one thousand eight hundred and eighty-four.

[SEAL.] AUGUSTUS J. RICKS,
Clerk of the Circuit Court of the United States,
Northern District of Ohio.

Allowed by—

Return on Writ of Error.

UNITED STATES OF AMERICA,
Eastern Division of Northern District of Ohio:

I, Augustus J. Ricks, clerk of the circuit court of the United States within and for said district, do hereby certify that, in obedience to the command of the within writ of error, the court has duly searched the record and proceedings of the said court in the cause aforesaid, and now herewith transmit to the Supreme Court of the United States a full and complete transcript thereof.

In witness whereof I have hereunto set my hand and affixed the seal of said circuit court, at office in the city of Cleveland, this 27th day of September, A. D. 1884.

[Seal of the Circuit Court, Northern District of Ohio.]

AUGUSTUS J. RICKS, *Clerk.*

3 The United States of America to George R. Madison, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eastern division of the northern district of Ohio, wherein The New York, Lake Erie and Western Railroad Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Martin Welker, district judge of the U. S. and one of the judges of the circuit court of the U. S. for the N. D. [of] O., this second day of September, in the year of our Lord one thousand eight hundred and eighty-four.

M. WELKER.

3½ NORTHERN DISTRICT OF OHIO, *ss:*

On the 2nd day of Sept., 1884, at Cleveland, Ohio, I delivered to the within-named George R. Madison a true and duly certified copy of the within citation.

For service	$2 00
Copy	50
Travel	50
	3 00

W. F. GOODSPEED,
U. S. Marshal.
By JOHN ODELL, *Deputy.*

4 And heretofore, to wit, on the 24th day of September, A. D. 1883, the following petition was filed in said cause in said court, viz:

Petition.

In the Circuit Court of the United States for the Northern District of Ohio, Eastern Division, *ss:*

GEORGE R. MADISON, Plaintiff,
vs.
THE NEW YORK, LAKE ERIE AND WESTERN RAILROAD CO., Defendant.

Now comes George R. Madison and says that he is a citizen of the State of Ohio and a resident of the district and division aforesaid; that the defendant is a corporation duly organized under the laws of the State of New York and a citizen thereof, having its principal place of business in said State, and was at all the times hereinafter specified operating as lessee a certain railroad known as the New York, Pennsylvania and Ohio railroad. Plaintiff says that he was at all the times hereinafter specified employed by this defendant as

brakeman, and that it was his duty, by virtue of his employment, to couple and uncouple railway cars for said defendant. Plaintiff says that on the 20th day of July, 1883, after a train of cars operated by said defendant, and on which train he was employed as aforesaid, had stopped at the town of Mantua, a station along the line of said company in the district and division aforesaid, it became necessary in the course of his duties to step between two cars of said train for the purpose of uncoupling them, and while so engaged, without any fault or negligence on his part, but through the fault and negligence of this defendant in permitting its road-bed at said town to remain in an unsafe, insecure, and dangerous condition, all of which was unknown to this plaintiff, his right foot was caught and held fast in said road-bed, and while so caught and held, being unable to extricate it, he was, without any fault on his part, but through the negligence and carelessness of defendant, struck, jammed, and run over by one of defendant's cars, so injuring his left leg as to necessitate its amputation and cause the loss thereof. Plaintiff says that by reason of the premises he has suffered greatly in mind and body; that he was and will be put to great expense in attending to said injury; that he has not been able to perform any work or labor since the date thereof, and will forever be greatly incapacitated for so doing. Wherefore plaintiff says that he has been damaged by said defendant in the sum of thirty thousand dollars, and prays that judgment may be rendered in his favor and against said defendant for said sum.

By MYER AND JOSEPH,
Pl'ff's Att'ys.

THE STATE OF OHIO, *Cuyahoga County,* } *ss:*

George R. Madison, being by me first duly sworn, says that he is the plaintiff in the above action, and that the facts stated and allegations contained in his above petition are true as he verily believes.

GEORGE R. MADISON.

Sworn to before me by the said George R. Madison and by him subscribed in my presence this 22d day of September, 1883.

GEORGE H. SCHWAN,
Notary Public.

Precipe.

In the Circuit Court of the United States for the Northern District of Ohio, Eastern Division.

GEORGE R. MADISON, Plaintiff,
vs.
THE NEW YORK, LAKE ERIE AND WESTERN RAILROAD CO., Defendant.

The clerk of said court will please issue summons upon the petition in the above-entitled action, returnable according to law, endorse- "Petition for money only. Amount claimed, thirty thousand dollars."

MYER & JOSEPH,
Pl'ff's Att'ys.

And afterwards, to wit, on the 29th day of Sept., A. D. 1883, the following summons was filed in said cause in said court, viz:

Summons.

THE UNITED STATES OF AMERICA, *Northern District of Ohio, Eastern Division,* } *ss:*

The President of the United States of America to the marshal of the northern district of Ohio, Greeting:

You are hereby commanded to notify The New York, Lake Erie and Western Railroad Company that it has been sued by George R. Madison in the circuit court of the United States within and for the said district, and that unless it answers by the 27th day of October, A. D. 1883, the petition of the said plaintiff against it filed in the clerk's office of said court, at Cleveland, in said district, such petition will be taken as true, and judgment will be rendered accordingly.

You will make due return of this summons on the 8th day of October, A. D. 1883.

Witness the Honorable Morrison R. Waite, Chief Justice of the United States, this 24th day of September, A. D. 1883, and in the 108th year of the Independence of the United States of America.

A. J. RICKS, *Clerk,*
By O. C. BEATTY,
Deputy Clerk.

NORTHERN DISTRICT OF OHIO, *ss:*

On the 28th day of September, 1883, at Cleveland, Ohio, I made due service of this writ by delivering true and duly certified copies thereof to James M. Ferris, superintendent; F. E. Pittman, assistant treasurer, and M. L. Fouts, general ticket agent of the within-named The New York, Lake Erie and Western Railroad Company, the president, vice-president, secretary, treasurer, or other general officer of said company not found within my district.

W. F. GOODSPEED,
U. S. Marshal,
By JOHN ODELL, *Deputy.*

(Endorsed:) "Petition for money only. Amount claimed, thirty thousand dollars." Returnable October 8th, 1883. Rule for answer October 27th, 1883. Returned and filed September 29th, 1883. A. J. Ricks, clerk.

8 And afterwards, to wit, on the 27th day of October, A. D. 1883, the following answer was filed in said cause in said court, viz:

Answer.

In the Circuit Court of the United States for the Northern District of Ohio, Eastern Division.

GEORGE R. MADISON, Plaintiff,

vs.

THE NEW YORK, LAKE ERIE AND WESTERN RAILROAD CO., Defendant.

Now comes defendant, and for answer to plaintiff's petition filed herein against it, says:

It admits the citizenship of plaintiff and defendant and defendant's corporate character as alleged; admits that defendant was, on July 20th, 1883, operating the New York, Pennsylvania, and Ohio railroad in Ohio and at Mantua station, in said State and judicial district, as lessee hereof as alleged; admits that plaintiff was then and there in its employ as a brakeman upon one of its trains—a local freight train—and that he received an injury while attempting to uncouple one portion of said train from the residue thereof. Defendant denies each and every allegation in the petition contained not herein expressly admitted.

Further answering, defendant says all and whatever injury plaintiff did receive on said occasion he received as the consequence of his own negligence, which contributed to and caused such injury as its proximate cause.

Wherefore defendant prays to be dismissed hence with its costs.

THE NEW YORK, LAKE ERIE AND WESTERN RAILROAD CO.,

9 By ADAMS AND RUSSELL, *Its Attorneys.*

STATE OF OHIO, *Cuyahoga County:*

L. A. Russell, being sworn, says he is one of the attorneys of defendant, which is a railroad corporation, non-resident of Ohio; that the facts stated and allegations made in the foregoing answer are true, as he verily believes.

L. A. RUSSELL.

Sworn to before me and subscribed in my presence by said L. A. Russell this 27th day of October, A. D. 1883.

GEORGE D. WALKER,
Notary Public.

And afterwards, to wit, on the 20th day of February, and on the days following, as hereinafter mentioned, each being days of the February term, A. D. 1884, of said court, the following proceedings were had in this cause, viz:

Jury Empanelled.

GEORGE R. MASON

vs.

THE NEW YORK, LAKE ERIE, & WESTERN R. R. CO.

WEDNESDAY, *February 20th.*

This day came the parties, by their counsel, and a jury being called came, to wit, David Murray, John Peterson, Willian Belknap, J. M. Leland, David Henry, John Walworth, Friend Whittlesey, N. B. Jenkins, Walter Putman, Abner Osborn, Hiram Fisher, and Eleab Purdy, who, being accepted, were empanelled and sworn to well and truly try the issues joined between the parties at bar, and thereupon the trial of this cause proceeded. Testimony was offered by the plaintiff, but not closed, when the further trial of this case was continued until to-morrow.

10 THURSDAY, *February 21st*, 1884.

This day came again the parties, by their counsel, and came the jury as heretofore empanelled and sworn herein, and the trial of this cause proceeded. The testimony of the plaintiff was continued but not concluded, when the further trial of this case was continued until to-morrow.

FRIDAY, *February 22nd*, 1884.

This day came again the parties, by their counsel, and came the jury as heretofore empanelled and sworn herein, and the trial of this cause proceeded. The testimony of the plaintiff was closed, and dofendant's testimony was begun but not concluded, when the further trial of this cause was continued until to-morrow

SATURDAY, *February 23d*, 1884.

This day came again the parties, by their counsel, and came also the jury as heretofore empanelled and sworn herein, and the trial of this cause proceeded. The testimony of defendant was continued but not concluded, when the further trial of this case was postponed until Tuesday next.

On Tuesday, February 26th, no proceedings were had in this case.

WEDNESDAY, *February 27th*, 1884.

This day came again the parties, by their counsel, and came
11 also the jury as heretofore empanelled and sworn herein, and the trial of this case proceeded. The defendant's testimony was concluded, but the hour of adjournment having arrived the further trial of this case was continued until to-morrow.

FRIDAY, *February 29th*, 1884.

This day again came the parties, by their counsel, and came also the jury as heretofore empanelled and sworn herein, and the trial of this case proceeded. The arguments of counsel were begun but not concluded, when the further trial of this case was continued until to-morrow.

SATURDAY, *March 1st*, 1884.

This day again came the parties, by their counsel, and also came the jury as heretofore empanelled and sworn herein, and the trial of this cause proceeded. The arguments of counsel were continued but not concluded, when the further trial of this case was postponed until Tuesday next.

TUESDAY, *March 4th*, 1884.

This day again came the parties, by their counsel, and came also the jury as heretofore empanelled and sworn herein, and the trial of this case proceeded. The arguments of counsel were concluded, and the jury having first received their instructions from the court retired to deliberate in charge of the marshal, but not having yet reported with a verdict when the hour for adjournment arrived the further trial of the case was postponed until to-morrow.

12 WEDNESDAY, *March 5th*, 1884.

This day again came the parties, by their counsel, and came also the jury as heretofore empanelled and sworn herein, and said jury having agreed upon a verdict come into court, and for verdict say: "We, the jury in this case, being duly empanelled and sworn, do find for the plaintiff, and we do assess his damages to the sum of seven thousand dollars.

FRIEND WHITTLESEY,
Foreman."

And afterwards, to wit, on the 8th day of March, A. D. 1884, the following motion was filed in said cause in said court, viz:

Motion for New Trial.

In the Circuit Court of the United States for the Northern District of Ohio, E. D., 6th Circuit.

GEORGE R. MADISON, Plaintiff,

vs.

THE NEW YORK, LAKE ERIE AND WESTERN RAILROAD CO., Defendant.

Now comes defendant, after verdict rendered, and before entry of judgment thereon, and moves the court to set aside the verdict of the jury heretofore rendered in said cause, and to grant a new trial of said cause, and for grounds of said motion defendant alleges:

1st. Irregularity in the proceedings of the court, by which defendant was prevented from having a fair trial.

2nd. That the verdict is not sustained by sufficient evidence.

13 3rd. That the verdict is contrary to law.

4th. Newly-discovered evidence material for the defendant which it could not with reasonable diligence have discovered and produced at the trial.

5th. Error of law occuring at the trial and excepted to by defendant, at the times of its occurrence in the following particulars, viz: In admitting testimony offered by plaintiff and objected to by defendant; in refusing to admit testimony offered by defendant; in refusing to charge the jury as requested by defendant in its third, third and a half, sixth and ninth requests, and defendant's request to withdraw from consideration of jury all evidence of change of planking at place of injury after injury occurred; in the charge of the court as given to the jury in the several respects in said charge at the time excepted to, and pointed out specifically in the stenographic report of said charge.

For each of which several causes defendant alleges it is aggrieved, and was prevented of a fair trial and of its rights.

ADAMS AND RUSSELL AND
J. E. INGERSOLL,
Att'ys for Defendant.

And afterwards, to wit, on the 31st day of March, A. D. 1884, the following affidavits were filed in said cause in said court, viz:

Affidavits in Support of Motion.

In the Circuit Court of the United States for the Northern District of Ohio, Eastern Division.

14 GEORGE R. MADISON, Plaintiff,

vs.

THE NEW YORK, LAKE ERIE & WESTERN R. R. Co., Defendant.

Affidavit of L. A. Russell.

L. A. Russell, being sworn, says he is one of the attorneys of defendant in this cause, and had charge of preparing said cause for trial, and exercised all possible diligence and care to learn of all persons who witnessed the accident in which plaintiff was injured, but did not and could not learn that Anson Stitt, whose affidavit is herewith filed, had been or was a witness to said accident until after the trial of said cause, when, from a conversation in which said Stitt took part, which was heard by the station agent at Mantua, Mr. Folger, he became aware that said Stitt had witnessed said accident, and said Folger reported the fact, through Mr. Wood, the superintendent of defendant's Mahoning division, to affiant, who thereupon, without delay, visited said Stitt and procured from him the affidavit herewith filed. Affiant had no knowledge whatever that said Stitt had witnessed said accident till it was too late to produce his testimony on the trial of said cause, and the evidence of said Stitt is the newly-discovered testimony on which is based that ground of the motion for new trial in said cause.

L. A. RUSSELL.

Sworn to before me by said L. A. Russell this 31st day of March, A. D. 1884.

O. C. BEATTY,
U. S. Com'r, N. D. O.

15 *Affidavit of Anson Stitt.*

In the United States Circuit Court for the Northern District of Ohio, Eastern Division.

GEORGE R. MADISON, Plaintiff,

against

THE NEW YORK, LAKE ERIE AND WESTERN RAILROAD CO., Defendant.

Anson Stitt, being sworn, deposes and says he is forty-four years of age, and resides in Mantua, Portage county, Ohio, and in July of 1883 was one of the trustees of said township, and on the 20th day of July was at Mantua station attending to some duties of his office as such trustee, and was standing by the telegraph pole, near the northwest corner of the railroad station building, in the angle of the railroad track and highway crossing, when the local freight train, bound west, pulled into the station at about noon of said day; that he then noticed a brakeman pass him on the ground on the way, going west and alongside of said freight train, which was on the main track, just across the house side track from where affiant stood; that after said brakeman had passed affiant, going westward, affiant saw him go between two cars of said freight train, as affiant supposed, to uncouple said cars, as affiant supposed, to leave the highway crossing clear. As affiant saw the brakeman go between said cars the said train had halted, or was just halting, and affiant believes they had come to a halt; or, if they were then moving at all, they were moving very slowly, and just about finally halting. Almost immediately after said brakeman went in between said cars, indeed,

16 as soon as he went in, the cars started up a little, and I heard him holler, and I looked around, and he was caught and appeared to me to be hanging on to some iron on the car behind him, the same car which ran onto him; it seemed to me to be some iron—brake iron, or other iron—nearer to the side of the car than the bumper or draw-head; but of this I will not [be] positive as to what it was he hung on to, only that it was something attached to the car next east of him, or behind him, in the train. It seemed to me that after the holler, till the cars were finally stopped, they did not go forward more than six or eight feet; but I know that the brakeman was taken out after he was hurt near the middle of the highway crossing, and the place where he had got his foot in between the crossing-plank and the rail appeared to be near the east end of the crossing-plank—perhaps two feet west of the end—and from that point to where he was taken out seems to be some twelve or fourteen feet. I know the cars seemed to stop very quick after the man hollered and was down. It did not seem to me that any wheel ran

over his leg, but if it did I suppose it may have been in the moment he hollered and before my eyes were upon him again after I saw him go in. I was attracted by his hollering, and looked then again at him. After the accident I went onto the crossing and tried the place with my foot, and could not get my foot, which, on the boot-sole I had on, is full three and a half inches wide, caught in the place at all; but there were other men there who could get their foot in between the rail and plank. Some men measured the opening, but I do not know how wide it was. The plank was
17 spiked down solid all the way, and appeared to be sound, but was wore some on the edge by the car-wheel flanges as it would be anywhere.

I did not see or hear or notice anything about any signals about moving or stopping the train.

ANSON STITT.

Sworn to before me and subscribed in my presence by Anson Stitt this 25th day of March, A. D. 1884.

GEORGE D. WALKER,
Notary Public.

And afterwards, to wit, on the 15th day of May, A. D. 1884, the following motion was filed in said cause in said court, viz:

Motion for Order.

In Circuit Court of U. S. for Northern District of Ohio, Eastern Division.

GEORGE R. MADISON *vs.* N. Y., L. E. & W. R. R. Co.

Now comes the defendant and moves the court to make an order *nunc pro tunc* on the clerk to file as of the February term the bill of exceptions heretofore at the February term, 1884, signed and allowed by the court in this case.

J. E. INGERSOLL &
L. A. RUSSELL,
Att'ys for Def't.

And afterwards, to wit, on the 21st day of July, being a day of the April term, A. D. 1884, of said court, before the Honorable Martin Welker, one of the judges of said court, the following order was entered in said cause in said court, viz:

18 *Judgment on Verdict.*

GEORGE R. MADISON, Pl'ff't,
vs.
THE N. YORK, L. ERIE & WESTERN RAILROAD CO., Def't.

Journal entry.

And now, on the 21st day of July, A. D. 1884, being a day in the April term, A. D. 1884, of said court, the defendant's motion for a

new trial of this cause is heard and overruled, to which the defendant excepts; and thereupon the defendant's motion for an order *nunc pro tunc* heretofore filed at said April term, A. D. 1884, to wit, the 15th day of May, 1884, is heard and granted, and the clerk is ordered to file the bill of exceptions therein referred to now for then, as of the said February term, A. D. 1884; to which order last named the plaintiff then and there excepts.

Thereupon it is considered by the court that the plaintiff recover of the defendant the sum of ($7,000) seven thousand dollars, with interest from February 5th, A. D. 1884, being the first day of said February term, together with his costs, and further ordered that defendant pay its own costs.

And afterwards, to wit, on a day of the February term, A. D. 1884, the following bill of exceptions was filed in said cause in said court, being so filed as of the February term, 1884, under order of July 21, 1884, j'n'l 13, 458, viz:

Defendant's Bill of Exceptions.

In the Circuit Court of the United States for the Northern District of Ohio, Eastern Division, Sixth Circuit. February Term, A. D. 1884.

19 GEORGE R. MADISON, Plaintiff,
vs.
THE NEW YORK, LAKE ERIE AND WESTERN RAILROAD COMPANY, Defendant. } No. 4228.

Be it remembered that at the February term, A. D. 1884, of said court, to wit, on February 20th, A. D. 1884, a day of said term, this cause came on to be tried before his honor Judge Martin Welker, the district judge of said district, holding said circuit court, and a jury, and thereupon, to maintain the issues on his part to be maintained, the said plaintiff offered in evidence the testimony of a witness called by him and named FRANK BARBER, as follows, viz:

Question by Gen'l ED. S. MYER, pl'fft's attorney, p. 49, testimony: "I would ask you whether, at the time you measured it or shortly after, you saw anything being done with regard to taking up that plank?" (In reference to plank where plaintiff was injured, and measured by witness after the injury.)

To which testimony defendant, by its counsel, then and there objected, and the court overruled said objection and permitted said witness to testify to the jury in answer to said question, and to said ruling defendant then and there duly excepted; and to said question so permitted and supplemented by the further question, "Q. Now, what did they do?"—[to which] defendant objected; court overruled the objection, and defendant then and there excepted—said witness made answer:

"A. They took up those planks, but whether they turned them over and put them down or put down new ones I could not state; but I know they placed the plank closer to the rail."

And plaintiff offered the following testimony of a witness
20 called by him named WILLIAM R. BOWEN (p. 59):

A. I think, if I remember right, the injury was just about noon.

Q. And this was some time after?

A. Yes, sir.

Q. What did you see them do?

To which question and testimony defendant then and there objected, and the court overruled said objection and permitted said witness to testify in answer thereto to the jury, and to said ruling defendant then and there duly excepted, and said witness answered.

A. I saw them take up the planks.

Q. Who take up the planks?

A. Johnny King and his men.

Q. Who is Johnny King?

A. He is the section boss. * * * (P. 60.)

Q. With regard to the position of the plank they had taken up at this point at which this injury is said to have occurred, in what position did they place those they had put in instead of the ones taken out?

(Objected to.)

Q. State what they did; where they put those planks.

Objected to by defendant. Objection overruled by the court, and to said ruling and the admission of said testimony defendant then and there excepted.

A. When they put it down they put it about two inches from the rail.

And the plaintiff offered the testimony of a witness called by him and named GEORGE W. FRANKLIN (p. 78), as follows:

Q. I would ask you if you know whether that plank continued in the condition you saw it there during the balance of that day?

A. It did not.

Q. What became of it; do you know?

Objected to by defendant. Objection overruled. Defendant then and there excepted to said ruling and testimony.

A. I think, immediately after dinner or as soon as the section man could, they went to work and repaired this crossing.

Q. You saw the section boss repair it or his gang?

Same ruling by court and exception by defendant continued to all testimony offered by plaintiff on this point.

A. Yes, sir. * * *

21 Q. Now you have stated generally that they repaired the crossing; just tell the jurors what they did.

A. My impression is that they removed the old plank that was there and placed down new plank, and placed them up near the rail.
Q. About how near; do you know?
A. I would not say; no, sir.
Q. Did you ever examine that with your foot or otherwise? (P. 79.)

(All testimony of this witness in relation to repairs of crossing after injury to plaintiff objected to by defendant. Objection overruled by the court, and defendant then and there excepted to said ruling and testimony.)

A. Afterwards?
Q. Yes.
A. No, sir; not that I know of at that time. Do you mean that day?
Q. No, no; after the repair had been made.
A. I don't remember that I ever did.

Plaintiff also offered the testimony of CHARLES W. BRAINARD, as follows (p. 96):

Q. You may state whether you saw any work done upon that crossing that day after the accident, at any time.

Objected to by defendant. Objection overruled by the court. Defendant then and there excepted to said ruling and admission of testimony.

A. Yes, sir. * * * (P. 97.)
Q. Now you may state what you saw them do there.

Objected to by defendant. Objection overruled by the court. Defendant then and there excepted to said ruling and testimony.

A. I saw them to work on this planking; took it up and changed it.
Q. What did they do?
A. I could not swear whether they put down new plank in there or whether they used some of these old plank, but they changed the space there where the accident occurred.

Plaintiff also offered testimony as follows from his witness, ROBERT B. PARKMAN:

Q. You may state whether, after this injury had been received, you observed any working or anything going on about that crossing. (P-. 103 and '4.)

22 Objected to by defendant. Objection overruled by the court, and defendant then and there excepted to said ruling and testimony being admitted.

A. I noticed their putting down a plank.
Q. Who were putting down a plank?
A. Well, it was the section hands or boss.

Plaintiff also offered the testimony of C. D. INGELL, as follows (p. 131):

Q. You may state as to whether you saw any work being done at that crossing that day.
A. I did.
Q. Before or after the injury had occurred?

Objected to by defendant. Objection overruled by the court, and defendant then and there duly excepted to the ruling admitting said testimony.

A. After.
Q. How soon after the injury or this occurrence that you have related?
A. I think in the neighborhood of half an hour—I will take that back—I mean within the neighborhood of half an hour from the time I tried my foot there.

Plaintiff also offered the testimony of his witness, FRANK HALSEY, as follows, p. 161:

Q. Did you observe the condition of the crossing after they had completed what they were at?
A. Yes, sir.
Q. How did you find it with regard to that space you have mentioned?

Objected to by defendant. Objection overruled by the court, and defendant then and there excepted to said ruling.

A. It was about two inches—the space was about two inches.

Plaintiff also offered the following testimony from his witness, JOHN GREGORY:

Q. You may state whether or not you saw either of those persons (Collopy, road-master, and John King, section boss), or both of them, there at that time (after accident).
A. Yes, sir; I did.
Q. At the crossing?
A. Yes, sir.
23 Q. You may state whether anything, was said by Mr. Collopy to Mr. King in your presence.
A. Yes, sir.
Q. Upon the subject of the condition of the plank and rail at the crossing?
A. Yes, sir.
Q. What was it?

Objected to by defendant.

The COURT: He could not bind the company by any statement he would make as to the then present condition.

A. Why, he shook his head to Mr. King and took out his rule and measured it, and said to Mr. King it was too far off and you had better fix it.

Defendant, by his counsel, then moved the court to strike out the last answer of the witness from the record, p. 292.

Motion overruled by the court, and to said overruling and permitting said testimony to go to the jury defendant then and there excepted.

Q. What, if anything, did you see Mr. King do, or any one, with regard to the condition of that planking?

Objected to by defendant. Objection overruled by the court, and the defendant then and there excepted.

A. I saw a man put his foot in it.
Q. Who was it?
A. I don't just recollect who it were. * * * (P. 293.)
Q. Do you know whether it was not changed afterwards?

Objected to by defendant. Objection overruled by the court. Defendant then and there excepted. * * *

A. Yes, sir; I saw it in the evening after it had been fixed. Yes, sir.
Q. When you saw it in the evening you may state what its condition was, the space between the first plank north of the south rail of the main track and that rail—what its condition was then as compared with what it was when you saw it at noon, or before?
A. Well, I saw it was between two and three inches.
Q. Had it been changed in any way?
A. Yes, sir; it had been put up closer.
Q. How much do you say, if you know?
24 A. Well, I judge before it was about three inches and a half, from that to four inches, in places.
Q. Before?
A. Yes, sir.
Q. But when you last saw it, about what?
A. About two and a half, I should judge.
Q. You did not measure it?
A. No, sir.

Plaintiff offered the following testimony in the cross-examination of a witness called by the defendant in its defense and named John King; the said John King, in his direct examination by defendant not having testified in regard to any change made in the plank after the accident (p. 600):

Q. (By Gen'l MYERS, for pl'ff.) You have stated, have you not, that immediately after the accident, or within an hour after, whatever time it was, you put down a new plank, taking up the old one?
A. Yes, sir.

To which testimony, question and answer, defendant then and there objected to and asked withdrawn from the jury, and the court overruled said objection and refused said prayer, and to said ruling and refusal the defendant then and there excepted.

Q. What did you understand Mr. Collopy to mean when he said that the space between the plank and the rail might be a liitle nearer?

A. Well, I suppose he wanted it a little nearer probably.

Q. And then you put it nearer—put in a new one?

A. He didn't tell me to put it nearer.

Q. But you understood when he said that it might be a little nearer—that it ought to be a little nearer?

A. Well, I generally use my own judgment in regard to keeping the track in shape. * * * Page 607.

Q. Now, how soon did you take up that plank after Collopy said that?

Objected to by defendant. Objection overruled by the court, and defendant then and there excepted.

A. After dinner. * * * P. 608.

25 Q. Now, do you say that that crossing, worn as it was there that day, was in the best possible repair?

Objected to by defendant, and not answered.

Next—p. 609:

Q. You took up that plank, didn't you that day, and put down a new one because it was out of repair?

Objected to by defendant. Objection overruled by court, and defendant then are there excepted.

A. Yes, sir.

Plaintiff also offered in evidence the following specified rules in defendant's book of rules, to wit:

Rule	2,	on page	5,	of said	book of	rules.
Rule	108,	"	39,	"	"	"
"	114,	"	43,	"	"	"
"	127,	"	48,	"	"	"
"	129,	"	51,	"	"	"
"	133,	"	52,	"	"	"
"	149,	"	55,	"	"	"
"	183,	"	62,	"	"	"
"	198,	"	69,	"	"	"
"	202,	"	70,	"	"	"
"	207,	"	71,	"	"	"
"	218,	"	73,	"	"	"
"	208,	"	71,	"	"	"

And, further, the following: Rule 42, on page 198, and rule 19, on page 205, in book called "Road-masters' Assistant."

Defendant then and there objected to all and to each of said rules offered by plaintiff in both said books as irrelevant.

The court overruled said objections, and defendant then and there excepted, and the copy of the rules so specified taken from said two books are hereto attached, marked Exhibit A, and made a part of this bill of exceptions.

Before the jury retired defendant, by its counsel, consented
26 that said two books in which said rules are contained be sent to the jury in their consultation room, which was accordingly done.

And after the testimony was closed the defendant, among other things, requested the court to charge the jury as follows in its request numbered 3, to wit:

III. "If the jury shall find from the evidence that defendant has exercised ordinary and reasonable care in the employment of the road-master and section foreman, who had the duty of looking after the crossing where the injury to plaintiff occurred, and in the retaining of them in its service, then it would not be liable for a lack of ordinary and reasonable care on the part of such road-master or section foreman in regard to keeping said crossing in repair unless plaintiff shall prove by a preponderance of evidence that a defective condition of the crossing existed before the time of the accident and the knowledge of such defect had been brought to the defendant long enough to have remedied the same."

The which requested charge the court refused to give to the jury, and to said refusal the defendant then and there excepted.

And the defendant requested the court to charge the jury in defendant's request numbered three and a half, as follows, to wit:

"3½. The plaintiff must recover, if at all, by a proof of that negligence which he specifies in his petition, and as that only alleges negligence in regard to the condition of the highway crossing, he is not at liberty to claim against defendant's objection that the superior officer of plaintiff, the conductor, was guilty of negligence in giving orders for moving the train."

The which requested charge the court refused to give to the jury, and to said refusal the defendant then and there excepted.

27 And in its request numbered six the defendant requested the court to charge the jury as follows:

VI. "Neglect on the part of a fellow-servant to search for and correct a defect, if one existed at said crossing, is such a risk as is included in the risk assumed by plaintiff in entering into defendant's service."

The which request the court refused to give in its charge to the jury, and to said refusal defendant then and there excepted.

And defendant in its ninth request requested the court to instruct and charge the jury as follows:

IX. "In case you shall find the defendant guilty of negligence under the rules of law given by the court, you shall state in your verdict in what the negligence consisted, whether in the condition of the plank at the crossing or in some other particular, and if in

some other thing or matter the jury shall state in what and who was the person or servant of defendant guilty of negligence."

The which requested instruction and charge to the jury the court refused to give, and to said refusal defendant then and there excepted.

And thereupon the court charged the jury, among other things, as follows, to wit, p. 679:

"You will see that there are two items charged as negligence in this petition: the first, that the road-bed was permitted to be in an unsafe, insecure, and dangerous condition, by reason of which the plaintiff's foot was caught fast, and while in that position, secondly, that the cars of the defendant were run over his leg, causing the injury of which he complains."

To which defendant then and there excepted.

The court further charged the jury, among other things,
28 as follows:

"Before this plaintiff is entitled to recover a verdict at your hands two things are necessary to be shown in the proof before you—first, the carelessness and negligence of the defendant as alleged and set up in the petition, and, secondly, that the plaintiff himself did not by his negligence and carelessness contribute to the injury."

To which portion of the charge as given the defendant then and there duly excepted.

The court further charged the jury as follows:

"Under this employment of this plaintiff as a brakeman the law fixes certain terms that regulate his rights and regulate his duties. A brakeman, by the terms of his employment, undertakes to perform all the usual duties of that position on the railroad, and undertakes to substantially obey all the rules of the company prescribed for the discharge of his duties, and takes all the ordinary risks of his place and also the risks of the carelessness and negligence of his colaborers employed and engaged in the same common employment *[and same department of duty connected with the operation of the railroad. His fellow-brakeman on the train, also the fireman and engineer are in law regarded as his colaborers. The conductor on his train is his superior, and he does not take the risk of the carelessness or negligence of his conductor, but he does take the risk of the other class of men that are denominated his colaborers.]* That enters into the very contract, and the same rule applies to railroads as to any other class of employees, where they are working together in the performance of a common duty. The employer is not
29 *is not* responsible for the carelessness and negligence of those who work together as colaborers."

To that portion of the above included between starred brackets *[]* the defendant then and there duly excepted.

The defendant requested the court to charge the jury as follows:

"The law puts on a person approaching a place where he knows is danger to use reasonable caution in looking for safety to himself, and if the jury find that plaintiff did not exercise such reasonable caution in looking where he was to step at the time of the accident,

then he was guilty of such contributory negligence as will preclude his recovery."

Which requested charge the court refused to give as requested, and to such refusal defendant then and there excepted.

And the court on said subject did charge the jury, among other things, as follows:

"Now, it was the duty of the plaintiff as such brakeman to exercise reasonable and ordinary care in uncoupling the cars to avoid injury in doing it. He was only required to exercise reasonable and ordinary care, such as a reasonably prudent man under the circumstances would have exercised under the definition which I have given you. In attempting to perform the duty of uncoupling the cars he was bound to exercise his own skill and judgment so as to protect himself from danger, and the defendant could not and was not to be regarded as warranting generally his safety. He was himself bound to exercise ordinary and proper care under the circumstances under which he was called to act, and cannot claim indemnity from defendant for an injury resulting to him which
30 might have been prevented if he had himself been reasonably vigilant under the circumstances and at the time. In the absence of knowlege, or a reasonable opportunity of obtaining knowledge, as to the condition of the plank along the side of the rail, the plaintiff had the right to suppose it was in a reasonably safe condition in going upon it."

To which portion of the charge as given to the jury defendant then and there duly excepted.

The court further charged the jury as follows:

"Now, a railroad company may entrust this duty (*i. e.*, to keep track safe) to others, a road-master or a section foreman, but it cannot by so doing escape the responsibility for its negligent non-performance. The acts of its agents in this regard are its acts. It was bound to use due and reasonable care in seeing that the track at the crossing where the plaintiff was required in line of his duty to uncouple cars was kept in a reasonably safe condition; and if the plaintiff, a brakeman in the proper discharge of his duties, was injured from a failure on the part of the defendant company to perform this duty it is liable, unless the plaintiff by his own carelessness contributed to his injury, about which I will speak in a minute."

To all of which portion of the charge as given defendant then and there excepted.

And the court further charged as follows:

"It was claimed by defendant's counsel in argument that this section foreman was a colaborer with this plaintiff, and if any injury resulted from carelessness it was the carelessness of this section foreman or the road-master. You will see that these instructions
31 do not sustain the doctrine as claimed by counsel for the defence, but on the other hand that the railroad company is required to perform—to see that this diligence is exercised by men who may be entrusted with the duty of keeping the railroad track and the machinery in order."

To which portion of charge defendant then and there excepted.

The court further charged the jury as follows:

"But, as I have read to you from the petition, the allegation is that the track was in an unsafe condition, and that the plaintiff got his foot in that place, and while there the defendant carelessly and negligently caused the train to be run upon him by which that injury was inflicted. Then you will look into the evidence, gentlemen, on these two points."

To which defendant then and there excepted.

The court further charged the jury as follows:

"In the next place, it is claimed that after this plaintiff got his foot in the place where it became fast the railroad company carelessly and negligently ran the cars upon him. These two charges of negligence simply constitute the one injury, and they must be made out by a fair preponderance of the proof before this plaintiff will be entitled to recover. Then the question arises as to what were the duties of the conductor of the train on which the plaintiff was operating as a brakeman. It was the duty of the conductor to use ordinary care and diligence in the management of the train, with due reference to the reasonable safety of the brakeman on his train. If he was without knowledge of the dangerous position of the plaintiff he had a right to suppose that he would take care of his own safety in moving forward the train. If, however, he knew or had reason to know that he was so between the cars and unable to get out by reason of the position of his foot, it would be gross
32 and criminal negligence to have under such circumstances moved forward the train. So that you are to look into all the evidence and say whether the carelessness that caused the injury was the result of both these allegations, want of a reasonable safe track or crossing, and also carelessness and negligence of the conductor under the circumstances in moving the train. Now, it will be important with reference to that, gentlemen, for you carefully to consider the circumstances under which this switching was attempted to be done."

To which defendant then and there excepted.

And the court further charged the jury as follows:

"Now, during the progress of the trial evidence was allowed to go to you of what was done immediately after the accident by King, the section foreman, with the reservation that a ruling would be made upon that subject at the proper time. Now, I direct you, gentlemen, that the fact that Mr. King, the section foreman, immediately after the accident, took up the plank and put down a new one, placing it closer to the rail than the one removed, is not to be regarded by you as an admission of the defendant of the defective character of the crossing. After the injury had happened these employees of the railroad company have no right to make admissions that will bind the corporation. They may make admissions in the discharge of duties that will bind the corporation, but after it is over, in giving their relation of how it took place, they cannot make admissions that will bind the corporation behind them for injuries resulting from an act that is not shown to be carelessness

by the evidence prior to and at the time when the injury was inflicted. That being the general rule in principle, then the
33 section foreman could not do anything that would bind the company, and therefore that line of testimony presented before you will not be considered by you as a circumstance to prove that its railroad track was not in a reasonably safe condition at the time; it is not to be so regarded by you."

To which defendant then and there excepted.

And the court further charged the jury as follows:

"If you find, then, that the defendant was guilty of the negligence as charged in this petition, and that the plaintiff did not contribute to the injury, then the plaintiff is entitled to recover a verdict at your hands. But if you even find that the defendant was guilty of carelessness in the respect charged by the plaintiff and the evidence satisfies you by a fair preponderance that the plaintiff contributed to the injury by his carelessness, still the plaintiff is not entitled to recover, and the defendant would be, under such circumstances, entitled to a verdict in its favor."

To which defendant then and there excepted.

And thereupon the jury retired and returned into court their verdict for plaintiff in the sum of seven thousand dollars, and defendant, at the February term, A. D. 1884, of said court presented this its bill of exceptions to matter occurring upon the trial of said cause at said February term to the court, and prayed the court to allow, sign, and seal the same and order the same to be made a part of the record in said cause, which is accordingly done as prayed at said February term, A. D. 1884.

M. WELKER. [SEAL.]

"EXHIBIT A."

Copy of Rules and Regulations Enumerated in the Bill of Exceptions aforesaid.

34 Rule 2, on page 5 of book of rules:

No. 2. He must obey promptly all instructions he may receive from persons placed in authority over him, and conform to all the regulations of the receiver.

Rule 108 (103), on page 39 of book of rules:

Conductors, brakemen, switchmen, and others having occasion to open and close switches must use the greatest care, and in no case attempt to close a switch until the last wheels are entirely off the switch rails. They must not give a train a signal to start on or out of a switch until after the switch is turned and the lock in hasp. Conductors will not permit new or inexperienced brakemen to open or close switches.

Rule 114, on page 43:

No. 114. The conductor of a freight train has leisure on the road to examine the wheels, brakes, and journals of his cars, and can have no excuse for allowing the journals to be neglected and to become

heated on the road. It will therefore always be presumed that the conductor is inattentive in regard to his subordinates if they are neglected. He is expected to do his business promptly and entirely at the station, and to run with regularity when not inter-upted by delays in the trains, mindful that he is running his train to do the business of the road, and not merely to make time over it.

Rule 127, on page 48:

No. 127. While waiting at stations he must do such switching as may reasonably be required by the station agent.

Rule 129, on page 51:

No. 129. He must not start his train till directed by the conductor nor till the bell be rung. He must invariably start with care,
35 and see that he has the whole of his train before he gets beyond the limits of the station, and he must run the train as nearly to time as possible, arriving at the station neither too soon nor too late.

Rule 133, on page 52:

No. 133. When attached to a train he will be subject to the orders of the conductor, who has exclusive charge of the train, and who will direct him when to start and when to stop.

Rule 149, on page 55:

No. 149. In bringing up the train he must pay particular attention to the state of the weather and the condition of the rails as well as to the length of the train, and these circumstances must have due weight in determining when to shut off the steam. Stations must not be entered so rapidly as to require a violent application of the brakes or to render the sounding of the whistle signal necessary.

Rule 183, on page 62:

No. 183. When the engineer shuts off steam at stations where the train is to stop, thereupon the brakeman must apply the brakes, and, using judgment, endeavor to stop at the station without the necessity of the engineer sounding his whistle; too much sounding of the whistle impairs its value as a signal of danger.

Rule 198, on page 69:

An experienced man must pass over each section every morning—on foot—and see that the track is in a safe condition; and he will especially look at each frog, switch, and switch-lock and all culverts and cattle-guards, and know that each is in perfect
36 order for the moving of trains. He will also examine each bridge, and see that all the nuts are in *its* place, and if loose or off the rods will report the fact at once by telegraph to the superintendent of bridges and the nearest bridge foreman.

Rule 202, on page 70:

202. Whenever it is necessary to remove or replace a rail in the track, or to repair a bridge, culvert, or cattle-guard, or in the event of any cause by which the track is rendered unsafe, a red signal must be placed conspicuously, and, in addition, two torpedoes must be placed on the track at a distance of not less than half a mile, or 16 telegraph poles, in each direction, by men sent out expressly (even when no train is due), and the signal shall be exhibited until the track is shown to be clear. And in case a curve or a summit of a grade shall be near the point of half a mile signals must be sent further so as to be entirely safe. A man must invariably be with the signal and remain with it until he receives orders to return.

Rule 207, on page 71:

207. Section foreman must report all accidents occurring on their sections by telegram to the road-master and chief engineer as soon as possible, giving the nature of the accident. On the same day they must send a written report of the accident to the road-master.

Rule 218, on page 73:

No. 218. In case of accident to any person or persons caused by the operations of this road an immediate report must be made by telegraph to the chief engineer and road-master, so that all persons whose duty it is to take action in such matter can be notified, and in case of an accident causing death the coroner must also be summoned by the nearest employé should it not be possible for the road-master, foreman, or other person in charge to do so.

37

Rule 208, on page 71:

208. Section men will see that highway and farm crossings are kept in the best possible repair and not obstructed by any material, and will in no case have hand or repair cars on highway crossings unnecessarily interfere with the proper use of any crossing.

Rule 42, on page 198, in book called "Road-masters' Assistant:"

No. 42. Road-masters must inspect their track. The divisions on the road have been subdivided into lengths of about 50 miles each to enable road-masters to walk over them, and it is expected they will not fail to fulfil this important duty.

Rule 19, on page 205, in book called "Road-masters' Assistant:"

No. 19. Road-masters will make careful investigation into the wear of the rails, fish-plates, spikes, bolts, washers, and ties, and encourage their foremen to investigate and examine and make reports and suggestions frequently.

38 Copy.

Know all men by these presents that we, The New York, Lake Erie and Western Railroad Company, as principal, Homer Ramsdell and John Tod, as sureties, are held and firmly bound unto George R. Madison in the full and just sum of fifteen thousand dollars, to be paid to the said George R. Madison, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this thirty-first day of July, in the year of our Lord one thousand eight hundred and eighty-four.

Whereas lately at the April term, A. D. 1884, of the circuit court of the United States for the eastern division of the northern district of Ohio, on the 31st day of July, in a suit depending in said court between George R. Madison and The New York, Lake Erie and Western Railroad Company, a judgment was rendered against the said The New York, Lake Erie and Western Railroad Company for seven thousand dollars, interest and cost of suit, and the said The New York, Lake Erie and Western Railroad Company having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said George R. Madison, citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday of October next:

Now, the condition of the above obligation is such that if the said The New York, Lake Erie and Western Railroad Company shall prosecute its writ of error to effect and answer all damages and costs if it fails to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

(Signed) THE NEW YORK, LAKE ERIE AND WESTERN, RAILROAD COMPANY,

[Seal of Corporation.]

By H. J. JEWITT, *President.* [SEAL.]
JOHN TOD. [SEAL.]
HOMER RAMSDELL. [SEAL.]

Attest:

E. D. HAMMOND,
Ass't Secretary.

Signed, sealed, and delivered in presence of—

—— ——.

Approved by—
M. WELKER,
Dist. Judge U. S.

Filed Sept'r 2nd, 1884.

39 *Certificate.*

UNITED STATES OF AMERICA, *Northern District of Ohio,* } ss:

I, Augustus J. Ricks, clerk of the circuit court of the United States for said district, do hereby certify the above and foregoing to be a true, correct, and complete transcript of the record of all the proceedings had in said court in the cause wherein The New York, Lake Erie and Western Railroad Company is complainant in error and George R. Madison is defendant in error, as the same appears from the files and records of said court now remaining in my custody.

In witness whereof I have hereunto set my hand and affixed the seal of said court, at my office in Cleveland, in said district, this 27th day of September, A. D. 1884, and in the one hundred and ninth year of the Independence of the United States of America.

[Seal of the Circuit Court, North'n Dist. of Ohio.]

AUGUSTUS J. RICKS, *Clerk.*

Endorsed on cover: N. Ohio C. C. U. S. No. 344. The New York, Lake Erie & Western Railroad Company, plaintiff in error, *vs.* George R. Madison. Filed October 6, 1884.

"VI. Neglect on the part of a fellow servant to search for and correct a defect if one existed at said crossing, is such a risk as is included in the risks assumed by plaintiff in entering into defendant's servants." This was refused by the Court.

But the Court gave the law on these matters to the jury as follows. (Record p. 18.)

"A brakeman by the terms of his employment * * takes all the ordinary risks of his place and also the risks of the carelessness and negligence of his colaborers employed and engaged in the same common employment, [and same department of dnty connected with the operation of the railroad. His fellow brakemen on the train, also the fireman and engineer are in law regarded as his colaborers. The conductor on the train is his superior, and he does not take the risk of the carelessness of his conductor, but he does take the risk of the other class of men that are denominated his colaborers.]"

The defendant excepted to that part which is embraced in brackets. And the Court further charged the jnry as follows:

"Now a railroad company may entrust this duty (*i. e.*, to keep track safe) to others, a road master or a section foreman, but it cannot by so doing escape the responsibility for its negligent nonperformance. The acts of its agents in this regard are its acts." * * * It was claimed by defendant's counsel in argument that this section foreman was a colaborer with this plaintiff and if any injury resulted from carelessness, it was the carelessness of the section foreman, or the road master. You will see that these instructions do not sustain the doctrine as claimed by counsel for this defense, but on the other hand that the Railroad Company is required to perform—to see that this diligence is exercised by men who may be entrusted with the duty of keeping the railroad track and the machinery in order," to all which portion of the charge the defendant then and there excepted.

We contend that the Court erred in directing the jury that the defendant was not entitled under the evidence to require plaintiff to assume the risk arising from the negligence of the road master or section boss, as that of a co-

laborer or fellow servant. The evidence showed that the supervision of the track was primarily in the chief engineer who has assistants under him in charge of divisions of the road, and under those are the section bosses and road masters with their helpers. The road master has in charge a few miles of track, say five or ten, and the section boss had care of a gang of men whose duty it was to accompany him and keep the track and road bed in repair for a definite short distance. The labor of each was bestowed to the common object to keep the track in good order so as to render safe and to facilitate transportation of goods and persons keeping the track and road bed solid, and clear of obstacles. These servants were hired by the same master who hired the brakeman. The labors of the two called them along the same track where the negligence of either is liable to produce injury to the other. Do not these conditions make them fellow servants?

From the leading case in this country, reported in 4, Met., 49, Farwell vs. Rail Road Co., there has probably been no question which has given more diversified answers than this, who are fellow-servants? And while it is, perhaps, impracticable to give a definition which will include all the instances which have been allotted to this class by the decisions of all the courts of this country; yet we think that a few essential attributes may be pointed out which may be safely relied upon as determining the great majority of the cases decided by one Court or another of last resort to belong to this class.

The most philosophical attempt to define who, among the various employees of a railroad company, are to be considered fellow-servants is, in our judgment, to be found in a case which, until it shall be substantially modified, is the rule of law for the Fedral Courts of the United States, because it is one laid down by this Honorabie Court, 109, U. S., 478: *Randall vs. R. R. Co.*

Here the employee injured was a brakemen engaged in unlocking a switch, when he was struck by the carelessness of an engineer connected with another train than his own. Mr. Justice Gray in delivering the opinion of the Court says: p. 483.

"The general rule of law is now firmly established, that one who enters the service of another takes upon himself the ordinary risks of the negligent acts of his fellow-servants in the course of the employment. *This Court has not hitherto had occasion to decide who are fellow servants within the rule.*"

"Nor is it necessary for the purposes of this case to undertake to lay down a precise and exhaustive definition of the general rule in this respect, or to weigh the conflicting views which have prevailed in the Courts of the several States; because persons standing in such a relation to one another, as did this plaintiff and the engineer of the other train, are fellow servants according to the very great preponderance of judicial authority in this country, as well as the uniform course of the decision in the House of Lords, and in the English and Irish Courts, as is clearly seen by the cases cited in the margin.

"They are employed and paid by the same master. The duties of the two being there to work, at the same place, at the same time; *so that the negligence of the one in doing his work may injure the other in doing his work.* Neither works under the orders or control of the other. Each, by entering into his contract of service, takes the risk of the negligence of the other in performing his service; and neither can maintain an action for an injury caused by such negligence against the corporation, their common master."

And since this case was decided, there have been added many more to the long list of cases cited by Mr. Justice Gray, in support of the above doctrine, among which we refer to the following:

62 Tex., 267: *R'y Co. vs. Rider.*
42 Ark., 417: *R'y Co. vs. Shackelford.*
60 Miss., 977: *R'y Co. vs. Doyle.*
30 Minn., 31: *Collins vs. R'y Co.*
78 Ind., 77.

54 Wis., 226.
85 N. Y., 61: *Slater vs. Jewett, Rec'r.*
88 N. Y., 146: *Murphy vs. R. R. Co.*
88 N. Y., 481: *Harvey vs. R. R. Co.*

It becomes important to know whether this rule established by a unanimous Court, has been substantially modified in any manner or to any extent.

The next case before the Supreme Court of the United States in which this doctrine was invoked, is found in 112, U. S. 377, *R. R. Co., vs. Ross.* An engineer had sustained injury by reason of the carelessness of the conductor of his train. While this Honorable Court in a divided opinion maintain the doctrine that a conductor having control of his train and who operates it, stands in place of the corporation towards those under his control, and therefore is not a fellow servant wth the engineeer; yet it seems to us remarkable that the opinion of the Court makes no reference to *Randall vs. R. R. Co.*, 109, U. S., (supra). But we understand the court to announce its assent to the doctrine laid down in 129, Mass., 268, *Holden vs. R. R. Co.*, that "It is difficult to limit the terms '*common employment*' so as to say that any persons employed by a railroad company *whose labors may facilitate the running of its trains* are not fellow servants, however widely separated may be their labors."

As we understand the two cases, the one in 112, U. S., lacks one of the distinguishing marks of fellow servants as laid down in 109 U. S., to wit, "Neither" (of the fellow servants) "works under the orders or control of the other." In the Ross case it is in proof that the other employees of the train are all under the control of the conductor and for this reason we understand the Court to reach the conclusion expressed on page 394, referring to the courts of Ohio and Kentucky.

"We agree with them in holding—and the present case requires no further decision—that the conductor of a railway train who commands its movements, directs when it shall stand, at what stations it shall stop, at what speed it shall run and has the general management of it *and control over the persons employed upon it, represents the Company*, and therefore, that for injuries resulting from his negligent acts, the company is not responsible."

So far then, as this case in 112 U. S. goes, it presents no departure from the rule of 109 U. S.

In 116 U. S., 642, *R. R. Co. vs. Herbert*, we find the next case in which the defendant below sought the protecton of this doctrine, a brakeman complained of the carelessness on the part of the employee who had care of the repairs of cars and of putting them into service. Here the Court by divided opinion hold, p. 652, that such superintendent of repairs, was so far as that duty was concerned the representative of the Company and his negligence was its negligence; and that *under the special Statutes of Dakota*, the master of repairs is not a fellow servant with a brakeman.

It is noteworthy that this decision makes no reference to the rule laid down by the remaining opinion of this honorable Court in 109 U. S. (supra).

If the decision in 116 U. S. (supra) was designed to modify the rule laid down in 109 U. S., we are led to enquire why attention was not called to such modification; and in view of the great weight of authority that approves the doctrine as one of the common law, that a master of repairs is a fellow servant with a brakeman or other employee engaged in operating a train, among which authorities we cite three unanimous decisions of the Supreme Court of Ohio—a Court known throughout the country for its disposition to give all reasonable protection to employees—covering a period from 1856 to 1886.

5 O. S., 541: *R. R. Co. vs. Barber.*
12 O. S., 475: *R. R. Co. vs. Webb.*
42 O. S., 318: *R. R. Co. vs. Fitzpatrick.*

And in view of these considerations we contend that it was not the design of 116 U. S. (*supra*) to modify the rule so carefully laid down in 109 U. S., (*supra*) to such extent as to exclude the employees implicated in the case at bar from being classed as fellow-servants. We are inclined to advocate the doctrine which we labored in argument before the Hon. Circuit Court in this case to establish, that the general officer of a rail road company, who stands first *in* charge of any department, should be held and stand in *loco principis*—representing the corporation; and the negligence of such chief officer would be the negligence of the corporation; and this doctrine would cover the cases, 112 U. S. and 116 U. S., as we understand them. But such standing in place of the corporation should not be extended to inferior employees having charge of small parts of any department, like a section boss on five miles of road.

Let us inquire then if in any essential characteristic the employees in the suit at bar fail to fall within the definition given in 109 U. S. (*supra.*)

The only point of dissimilarity lies in these words: "The duties of the two bring them to work at the same place, at the same time," but we contend that this is not meant to reqnire their usual, habitual employment, to be "at the same place, at the same time;" the remainder of the sentence shows the purport of this bringing together, viz., "*so that the negligence of one in doing his work may injure the other in doing his work.*

That being the material result of their being brought together, an insertion of the auxiliary "may" before the word "bring" in the quotation above made, will perhaps more fully give the meaning designed in those words. "The

duties of the two (*may*) bring them to work at the same place at the same time." It is certainly the fact in the case at bar that plaintiff and the section boss may be brought by their duties "to work at the same place at the same time;" but it is very plain that if the trackman reaches his post first, and does his work before the other arrives, "his negligence may injure the other in doing his work," though he comes along sometime later.

And this we claim brings the case at bar squarely within the rule of 109, U. S., (*supra*).

We are disposed before leaving this interesting discussion to bring especially to the notice of your Honors a case found in

8 O. S., 251: *Whaalen vs. R. R. Co.*

W. was engaged in repairs of the track of defendant's railroad, and the carelessness by which he was injured was that of a passing train from which a fireman accidentally threw a stick of wood. The Court held them to be fellow servants; and their case presents the same substantial relation as between the plaintiff and the one charged with negligence in the case at bar; except this is the converse of that. Here the one negligent is the trackman; there, the trackman was injnred. But we can find no reason for pronouncing them fellow servants in 8 O. S., and not fellow servants in the case at bar.

All which is respectfully submitted,

J. E. INGERSOLL,
L. A. RUSSELL,
Attorneys for Pl'tff in Error.

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SUPREME COURT U. S.
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IN THE

Supreme Court of the United States.

October Term, 1886.

No. 344.

The N. Y., L. E. & W. R. R. Co.,
Plaintiff in Error,

vs.

GEO. R. MADISON,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

J. E. INGERSOLL AND L. A. RUSSELL,
Attorneys for Plaintiff in Error.

IN THE

Supreme Court of the United States.

October Term, 1886.

No. 344.

THE N. Y. L. E. & W. R. R. Co., Pltff. in Error,

vs.,

GEO. R. MADISON, Deft. in Error.

BRIEF FOR PLAINTIFF IN ERROR

STATEMENT OF THE CASE.

The action below was brought by a brakeman to recover damages for injuries which he received to his person while he was engaged in attending to the duties required of him as such brakeman, and which he claims to have resulted from the negligence of the said Railroad Company.

The petition below sets out the negligence charged in the following language:

"Through the fault and negligence of the defendant in permitting its road bed at said town to remain in an unsafe, insecure and dangerous condition all of which was unknown to this plaintiff, his right foot was caught and held fast in said road bed, and while so caught and held, being unable, to extricate it, he was, without any fault on his part, but through the negligence and carelessness of defendant

struck, jammed and run over by one of defendant's cars, so injuring his left leg as to necessitate its amputation and cause the loss thereof." (Record page 3.)

The defendant's answer denies that there was any negligence on its part. (Record page 5.)

As appeared from the evidence, Madison, the plaintiff below, entered between two cars of a freight train with intent to perform the duties of a brakeman, but caught his foot between the rail of the track and the plank which was there spiked down between the tracks for a roadway crossing, and before he could extricate his foot, the car-wheel came upon him and caused the injury.

During the course of the trial the plaintiff below called several witnesses who against the objection and exception at the time taken by defendant, were permitted to testify, as to alterations made at the crossing soon after the accident, by the taking up of the plank and laying them down nearer to the rail. (Record pp. 11, 12, 13.) And it appearing that several hands together with the roadmaster and section boss who had charge of repairs of the track for a few miles, including the point of injury, were engaged in this alteration of the road crossing after the injury, the plaintiff was permitted against objection and exception by defendant to show by the testimony of a witness, John Gregory, what was said by the roadmaster in reference to the condition of the plank and rail—and one question involved is the competency of this evidence.

In the further course of the trial, it was claimed in argument by plaintiff below, that between the plaintiff as a brakeman, and the employee of defendant who had charge of keeping this part of the road bed in repair, known as a road master or section boss, there was not the relation of fellow servant existing, and therefore that the plaintiff in his service for defendant as a brakeman took no burden of

risk that might arise from the negligence of such road master or section boss. The defendant claiming that as the road master and section boss had charge of the repairs of a part of the track to the extent of a few miles including the road crossing when plaintiff was hurt; these employees sustained to plaintiff the relation of fellow servants; and unless it could be shown that defendant had been negligent in the employment of them or had knowledge of remissness in their duty, it was not liable to plaintiff for injury caused by the negligence of such road master or section boss, and the question thus involved arose upon the charge given by the Court, and its refusal to charge as requested by defendant.

These questions are presented by a Bill of Exceptions signed by the trial judge at the February Term, 1884, the term at which the case was tried. (Record p. 21.)

SPECIFICATION OF ERRORS.

1. *That the Circuit Court erred in the admission of incompetent evidence upon the trial.*

2. *That the Circuit Court erred in its charge to the jury.*

1. In considering the *first* error assigned, we call attention to the fact that it embraces two classes of incompetent evidence.

(*a*) Evidence showing changes made in the planking of the road crossing directly after the accident whereby the plank was laid nearer to the rail of defendant's track.

(*b*) Evidence of remarks and signs made by the road master during the making of these changes indicative of his own judgement that the former condition of the crossing was defective.

Upon the point (a) that changes were made directly after the accident. Several witnesses were called and permitted

to testify in face of Defendant's objection, and exception at the time made. We quote from some of these: (Record p. 12.)

W. R. Bowen, (Record p. 12) I think, if I remember right, the injury was just about noon.

Q. And this was some time after?

A. Yes sir.

Q. What did you see?

To which question and testimony defendant then and there objected, and the Court overruled said objection, and permitted said witness to testify in answer thereto to the jury; and to said ruling defendant then and there duly excepted, and said witness answered:

A. I saw them take up the planks?

Q. Who take up the planks?

A. Johnny King and his men.

Q. Who is Johnny King?

A. He is the section boss.

Q. With regard to the position of the plank they had taken up at this point, at which this injury is said to have occurred, in what position did they place those they had put in instead of the ones taken out? (Objected to.)

Q. State what they did where they put those planks?

Objected to by defendant; objection overruled by the Court, and to said ruliug and the admission of said testimony, defendant then and there excepted.

A. When they put it down they put it about two inches from the rail.

Five other witnesses testified upon the same matter to the effect that while the plank was, before the accident, about three and a-half inches from the rail, it was changed and put down about two inches from the rail. (Record, marginal, p. 24.)

That such evidence must have great weight with a jury

seems to go without saying—in truth it is very plain that the impression thus to be made furnishes the motive for its introduction. A jury will be expected to conclude, by the aid of counsel in argument, if not of their own thought. "Why! the Rail Road Company, themselves, see plainly enought that they are in default here, for they go right to work after the accident and mend this." But the current of authority is strong for the doctrine as laid down in

Pierce on Railroods, p. 294.

"Additional precautions and safeguards taken by the company *after an injury* are *not admissible* to show its negligence." (see cases cited by Pierce.)

In addition to the many cases cited by the learned author to support this principle,

We cite: 68, N. Y., 547, Baird vs. Daily;

45, Iowa, 27;

And 11, Am. & Eng. Ry. cases, 170; Morse vs. Ry. Co., decided by Supreme Court of Minn., in which reversing the doctrine maintained in several prior volumes of their re-reports, they stand by the doctrine above announced in Pierce.

(b) Evidence of remarks and conduct in shaking his head by the road-master when he went to make the repairs, are also incompetent evidence. Record p. 14.

"*John Gregory.* Q. You may state whether or not you saw either of those persons, Callopy, road master, and John King, section boss, or both of them there at the time, (after the accident.)

A. Yes sir, I did.

Q. At the crossing?

A. Yes sir.

Q. You may state whether anything was said by Mr. Callopy to Mr. King in your presence?

A. Yes, sir.

Q. Upon the subject of the condition of the plank?

A. Yes, sir.

Q. What was it? Objected to by defendant.

The Court. "He could not bind the company by any statement he would make as to the then present condition.

A. Why he *shook his head* to Mr. King, and took out his rule and measured it, and said to Mr. King, it was too far off and you had better fix it.

Defendant by its counsel then moved the Court to strike out the last answer of the witness from the record.

Motion overruled by the Court, and to said overruling and permitting said testimony, to go to the jury defendant then and there excepted."

To show the drift of this evidence and the force which plaintiff's attorney expected it to have upon the jury, he called said King and put to him several questions. (Record p. 16.)

Q. What did you understand Mr. Callopy to mean when he said that the space between the plank and the rail might be a little nearer?

A. Well, I supposed he wanted it a little nearer probably.

Q. But you understood when he said that it might be a little nearer, that it *ought* to be a little nearer?

A. Well, I generally use my own judgement?

Q. Now how soon did you take up that plank after Callopy said that? Objected to by defendant. Objection overruled by Court, and defendant then and there excepted?

A. After dinner."

Here the plain object of plaintiff's attorney was to impress on the jury the opinion or judgment of defendant's Road Master Callopy as expressed just after the accident, that this crossing was defective—such an expression of an opinion at such time was incompetent.

Pierce on Railroads, p. 294.

"The declarations and admissions of the Company's servants are admissable only when a part of the *res gestæ*. Although made on the day or at a short distance from the scene of the injury, the nearness in time and place do not qualify them if they are not a part of the transaction."

The authorites cited in the foot note are numerous and pertinent, and while the Court seemed to comprehend that

these were not admissions *sufficient to bind the defendant*, yet it was proper for the jury to pay some attention to them as tending to prove a defective track and therefrom negligence on part of the defendant.

It is true the Court in the course of its charge to the jury made a partial effort to counteract the force of a part of this evidence; so far as it embraced acts done by King, but the court merely limited the force of them as *admissions*, but the Court does not exclude this incompetent evidence entirely from the jury, as it should have done, and then, it may well be doubted if the impression made by its admission could be overcome, certainly it would not be an antidote to give a mild denial of its competency for one purpose, and still leave it for another; to deny its competency to establish an admission of carelessness against the company, and yet permit it to stand as some evidence of deficiency in the former work done, and to that extent evidence of negligence.

On page 20, Record, the court say:

"Now during the progress of the trial, evidence was allowed to go to you of *what was done immediately after the accident by King, the section foreman;* with the reservation that a ruling would be made upon that subject at the proper time. Now I direct you gentlemen that the fact that Mr. King, the section foreman, immediately after the accident, take up the plank and put down a new one placing it closer to the rail than the one removed is *not to be regarded by you as an admission of the defendant of the defective character of the crossing.* After the injury had happened these employees of the Railroad Company have no right to make admissions that will bind the corporation. They may make admissions in the discharge of duties that will bind the corporation but after it is over in giving their relation of how it took place they cannot make admissions that will bind the corporation behind them for injuries resulting from an act that is not shown to be carelessness by the evidence prior to and at the time when the injury was inflicted. That being the general rule then, the section

foreman could not do anything that would bind the Company, and, therefore, that line of testimony presented before you will not be considered by you as a circumstance to prove that its railroad track was not in a reasonably safe condition at the time; it is not to be so regarded by you."

An important part of this charge is misleading in one respect at least, to wit, so far as it deals wih efforts made by employees of a corporation after an accident in telling how it took place.

Now there had been no evidence by King or any other employees of this sort; and the remarks of the Court confuse the proof that had been given of what was done after the accident by way of repair; with proof of what might be said by employees in accounting for the accident.

And, as we have before remarked, the Court did not impress upon the jury that the evidence given to show what was done after the accident was incompetent for any purpose of proving negligence in defendant; but only cautioned the jury against using it as an *admission by defendant* of the defective character of the crossing. They might reject it as an *admission* and still hold on to it as evidence of the opinion held by defendant's servants that before the accident the crossing had been defective.

Again, this direction of the Court only deals with what *King* did. Leaves untouched the conduct and remarks of Callopy, the road master, and unwithdrawn the testimony of four or five witnesses as to what they had testified about the changes made right after the accident.

We submit to your Honors, that the gates were opened very wide when this evidence was let in; the effort to disabuse the minds of the jury of its force was very feeble and partial, and its natural effect was to work a great injustice to the defendant.

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IN THE

Supreme Court of the United States.

October Term, 1887.

No. 65.

THE N. Y., L. E. & W. R. R. CO.,
Plaintiff in Error,

vs.

GEORGE R. MADISON.
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

EDWARD S. MEYER.
Attorney for Defendant in Error.

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Plaintiff in Error,

vs.

GEORGE R. MADISON.
Defendant in Error.

Brief for Defendant in Error.

STATEMENT OF THE CASE.

The action below was brought by George R. Madison, a brakeman in the service of the New York, Lake Erie & Western Railroad Company, against said Company, to recover damages for injuries to his person received by him while in the proper discharge of the duties of his said employment and which he alleges were caused by the negligence of said Company.

The petition below sets forth the negligence complained of in the following language :

"The plaintiff says that on the 20th day of July, 1883, "after a train of cars operated by said defendant, and "on which train he was employed as aforesaid, had "stopped at the town of Mantua, a station along the "line of said company, in the division and district afore- "said, it became necessary in the course of his duties to "step between two cars of said train for the purpose "of uncoupling them, and while so engaged, without "any negligence on his part, but through the fault and "negligence of the defendant in permitting its roadbed "at said town to remain in an unsafe, insecure and dan- "gerous condition, all of which was unknown to this "plaintiff, his right foot was caught and held fast in said "roadbed, and while so caught and held, being unable "to extricate it, he was, without any fault on his part, "but through the negligence and carelessness of the "defendant, struck, jammed and run over by one of the "defendant's cars, so injuring his left leg as to necessi- "tate its amputation and cause the loss thereof." [Record page 3.]

The answer of the defendant below admits the employment; denies that there was any negligence on its part; and charges contributory negligence on the part of the plaintiff below as the proximate cause of the injury. [Record page 5.]

It appeared in evidence that after the train, a local freight train on which he was serving, had stopped at the station at Mantua, the plaintiff below, acting under instructions received from the conductor of the train, stepped between two of the cars thereof for the purpose of uncoupling them. That in so doing, his view being somewhat obstructed, his foot was caught between the rail of the track and a plank, located between the rails thereof and which formed part of a highway

crossing, and then was, and for some months had been ragged, out of place and repair, and insecurely fastened. That without waiting for the plaintiff below to come out from between the said cars, and while he was so held fast and unable to extricate his foot, and before he was able to complete the uncoupling, the conductor carelessly signalled the engineer to move forward the train, which was immediately done, and the car wheel coming upon the plaintiff below, he was injured as in his petition described.

It also appeared that by reason of the defective condition and position of the plank at the time of the injury —and for some months prior thereto—the space between it and the rail had been enlarged to a width of from 3½ to 4 inches; and that when in proper repair the space required for operating and running the company's trains was but from 2 to 2½ inches.

It further appeared in evidence, that the company's road-master, Mr. Collopy, had control of the entire road-bed and track within what was designated as the Mahoning dfvision of the road, in which the injury occurred, covering a distance of some fifty miles; that he had authority to employ and discharge the section-foremen therein, and was charged with the supervision of construction and repair; that Mr. King was the section-foreman for the section embracing some five miles of the road, and including the point at which the injury was received; that he was under the general control of the road-master, Collopy ; and had a gang of men under his orders, whom he employed and discharged at his pleasure; and that within his said section, foreman King was charged with keeping the road-bed in repair in

connection with, and under the instructions of said road-master Colopy. (Rule No. 42, page 23 of Record.)

In their opening statement at the trial, counsel for the defendant below stated the fact to be, that at the time of the occurrence complained of by the plaintiff below, the space between the plank and the rail, at the point at which his foot was caught, was the same as at all the highway crossings along the line of the company's road ; that the placing of the plank in question was in accordance with the uniform rule and custom of the defendant company below, both prior, and subsequent to the time of the injury to the plaintiff below; and that its position was proper, and its condition in fair repair when the injury occurred. And in the course of the trial witnesses were introduced by the defendant below to support the claim of its counsel in the opening statement, and among the number, its road-master, Collopy, and section-foreman, King, who testified in chief touching the condition and position of the plank in question, and the space between it and the rail at the time and point referred to, and represented the same to have been substantially as claimed by counsel ; but upon cross-examination were compelled to, and did substantially admit that the plank, at the time in question, was out of repair; and that both had knowledge of the fact for some months prior to the time of the occurence complained of.

In reply to the brief of the Plaintiff in Error, we respectfully maintain:

1. That there is no Bill of Exceptions, in the case at bar, of which this Honorable Court can take cognizance.

Revised Statutes of U. S., Sec. 914.
Revised Statutes of Ohio, Sec's 5298, 5301, 5302,

Kerr vs. The State, 36 O. S., 614.
Hill vs. Bassett, et al., 27 O. S. 597.
Muller vs. Ehlers, 91 U. S. 249.
Hunnicut vs. Peyton, 102 U. S. 333.

2. That the evidence claimed to be incompetent,—and which was withdrawn from the consideration of the jury,—was relevant as part of the res gestæ,—even though it disclosed the immediate repair of the defective roadbed by the road-master and section-foreman.

Morse vs. Ry. Co., 30 Minn., 465.
Baird vs. Daily, 68 N. Y. 547.
Casey vs. Ry. Co., 78 N. Y., 518.
Railroad Co. vs. Ingles, 15 B. Monroe, 637.
Dale vs. Ry. Co., 73 N. Y., 468.
Ry. Co. vs. McElwee, 67 Penn. St. 311.
Brehm vs. Ry. Co., 34 Barbour 256.

(And even if incompetent and improperly admitted, its admission would not constitute ground for reversal of judgment,—there being competent prima facie evidence in the case on the same point.)
Cooper vs. Coates, 21 Wallace, 105.

3. That the Circuit Court did not err in its charge to the jury.

(a). The duty of a Railroad Company to provide and maintain in proper repair a suitable and reasonably safe road-bed, tracks, and necessary appliances, is one that cannot be delegated to any of its servants so as to relieve the company of responsibility to a servant who is injured, without fault on his part, in consequence of its faulty or negligent performance,—even though the servant to whom such duty has been intrusted be a fellow-servant with the person injured. In the performance of such delegated duty the servant represents the Company, and his negligence is the negligence of the Company.

Davis vs. Ry. Co., 55 Vermont, 84.
Ford vs. Ry. Co., 110 Mass., 240.
Avilla vs. Nash, 117 Mass., 318.
Holden vs. Ry. Co., 129 Mass., 268.
Shaney vs. Androscoggin Co., 66 Maine, 420.
Hough vs. Ry. Co., 100 U. S., 213.
Ry. Co. vs. Herbert, 116 U. S., 642.

(b). Even if the injury to the servant is caused in part by the negligence of a fellow-servant, and in part by the failure of the defendant company to provide or maintain a suitable road-bed, track, or necessary appliances, the negligence of the fellow-servant will not exonerate the company from the consequences of its own default.

Ellis vs. Ry. Co., 95 N. Y., 546.
Railway Co. vs. Cummings, 106 U. S., 700.
Elmer vs. Lock, 135 Mass., 575.
Railway Co. vs. Herbert, 116 U. S., 642.

1. There is no Bill of Exceptions, in the case at bar, of which coguizance can be taken by this Honorabte Court.

Before proceeding to discuss the questions presented in the brief and argument of the learned counsel for the plaintiff in error, we would respectfully submit, there is no Bill of Exceptions in the case at bar that can be considered by this Honorable Court.

It is true there is a paper attached to the transcript, having the form of and purporting to be a bill of exceptions, but *it appears by the record* that the paper in question was not signed or sealed by the judge—if signed or sealed at all—until some time after the term at which the cause was tried. The record shows that the cause was tried at the February term, 1884, which term closed

on Monday, March 31st, 1884. [Vide Revised Statutes of the United States, Section 658.] It further shows that said paper purporting to be a bill of exceptions was never signed, sealed, or allowed by the judge in so far as any entry of the fact appears of record; that said paper was not presented to the clerk for filing, or by him filed until at the subsequent term, to wit: on the 21st day of July, 1884, under a *nunc pro tunc* order then made, and to which the defendant in error then and there excepted, it was filed "as of the February Term, 1884." The record shows that there was no consent that a bill of exceptions might be filed within thirty days, or at any time after the close of the February term at which the cause was tried;—nor was the allowance and signing thereof—if any there were—entered upon the journal as of the February term within thirty days after its said close; nor was the journal kept open, or directed to be kept open for that purpose, and therefore, we submit, the paper in question cannot be regarded in law as a bill of exceptions. The rule of the common law would certainly exclude it from the consideration of this Honorable Court, while the provisions of the statute governing the practice in the Circuit Courts in no manner improve its *status*.

The practice and mode of proceeding in regard to exceptions, allowance and filing of bills of exception, and proceedings in error are regulated by statutory provision, of which, pursuant to the requirements of the statute of the United States, we respectfully submit, this Honorable Court will take proper cognizance.

Section 914 of the Revised Statutes of the United States provides as follows:

"*Sec.* 914. The practice, pleadings, and forms and "modes of proceeding in civil causes, other than equity "and admiralty causes, in the Circuit and District courts, "shall conform, as near as may be, to the practice, plead- "ings, and forms and modes of proceeding existing at "the time in like causes in the Courts of record in the "State within which such Circuit or District courts are "held, any rule of court to the contrary notwithstand- "ing."

The Revised Statutes of Ohio then, and still in force, provide as follows:

"*Sec.* 5298. The party objecting to the decision must "except at the time the decision is made; and time may "be given to reduce the exception to writing, but not "beyond the term."

"*Sec.* 5301. When the decision is not entered on the "record, or the grounds of the objection do not sufficiently "appear in the entry, or the exception is to the "opinion of the court on a motion to direct a nonsuit, "to arrest the testimony from the jury, or for a new "trial for misdirection by the court to the jury, or be- "cause the verdict, or, if a jury was waived, the finding "of the court, is against law or the evidence, the party "excepting must reduce his exception to writing, and "present it to the court for allowance."

"*Sec.* 5302. If the exception be true, or, if it be not "true, then after it is corrected, a majority of the judges "composing the court must allow and sign it before the "case proceeds, or, if the party consent, within thirty "days after the term; the bill of exceptions shall be "filed with the pleadings, and, if the party require it, "made a part of the record, but not spread on the jour- "nal; and if it is to be signed after the term, the journal "must be kept open, and the allowance and signing "thereof entered thereon as of the term."

In deciding the case of *Kerr vs. The State, 36 O. S. 614*, a case similar to the one at bar, the Supreme Court of Ohio construed and applied the provisions of the statutes cited in the following language: * * *

"7. Divers errors, it is said, are shown by a bill of "exceptions. The record contains a paper called a bill "of exceptions, but we are not at liberty to consider it. "The cause was tried, verdict rendered, motion for a "new trial overruled, and sentence pronounced at the "October term, 1880. In fact, the case was finally "terminated at that term; but there was no entry made "during, or as of that term, showing the signing of any "bill of exceptions. The only entry of signing a bill of "exceptions was made in the minutes of the January "term, 1881. The statute [Rev. Stats. §7304], provides "for bills of exception in criminal cases, and that 'the "taking of all bills of exception shall be governed by "the rules established in civil cases'. In civil cases, the "bill may be allowed and signed during the term, or, "where the party taking the exception consents, such "bill may be allowed and signed at any time within "thirty days after the term; but where the bill is signed "after the term, 'the journal must be kept open, and "the allowance and signing thereof entered thereon as "of the term'. Rev. Stats. §5302. In this case it is "true that the bill was signed, and entered on the "journal of the court within thirty days after the ex- "piration of the October term, but, as already stated, it "was not entered in the minutes of, or as of that term; "and, according to the principle of cases decided by "this court, we are not permitted to disregard such "omission. Unless the statute is complied with, a bill "of exceptions cannot legally be regarded as part of the "record." [Pages 623 and 624.]

In the earlier case of *Hill vs. Bassett, et al., 27 O. S.* 597, the same court say, on page 599 of the decision: *

"Among the papers which, in this case have been "filed with, and are attached to, the authenticated trans- "cript of the docket or journal entries, and of the final "judgment rendered in the Court of Common Pleas, "we find a paper purporting, on its face, to be a bill of "exceptions, and to have been allowed and taken on "the trial of the case.

"But it is not authenticated by any certificate of the "clerk, as an original paper filed in the case; nor is "there anything in the record, outside of the paper "itself, which shows, or in any way intimates, that any "bill of exceptions whatever was taken, or attempted "to be taken on the trial.

"Such unauthenticated paper cannot be regarded as "part of the record. Before a paper purporting to be a "bill of exceptions can be treated as such, it must ap- "pear from the record, outside of such paper, that a bill "of exceptions was, in due time, tendered to, and al- "lowed, signed, and sealed by the court, and made part "of the record, and the paper in question must be ident- "ified, with reasonable certainty, as *the* bill of exceptions "which was thus made part of the record. Then, and "not till then, its contents import verity. We cannot "presume, in the absence of the proper evidence, that "any bill of exceptions was taken in this case. To "make such a presumption, and then to presume far- "ther, that the paper in question, unauthenticated, and "unidentified, is the original bill of exceptions so taken, "would be to inaugurate a loose system of practice, "leading to abuse, and wholly unwarranted.

"In so holding, we but follow the decisions of the "former Supreme Court of this State, under laws which "required, as our present code does, that bills of excep- "tions should be made part of the record, in order to "be regarded by a reviewing court upon error.

"The evidence in the case not being before us, the "questions made in argument by counsel do not arise,

"and we can but affirm the judgment of the Court of "Common Pleas."

In the case at bar, the record shows no entry during the February term, 1884, of the signing or allowance of any exceptions or bill of exceptions. It shows no entry of any granting of further time, after the term, to prepare and present such bill of exceptions for allowance. It contains no entry authorizing or requiring the journal of the court to "be kept open" for the entry of such allowance and signing within thirty days after the close of the term, "as of the term"; or of the fact that the journal was so kept open; or that any bill of exceptions was presented, allowed or signed, or made, or directed to be made part of the record in the case.

It is true that at the subsequent April term, 1884, to wit; on the 15th day of May, 1884,—*forty-five days after the close of the said February term*,—a motion was filed by counsel for the plaintiff in error, moving "the court to make an order *nunc pro tunc* on the clerk to file as of the February term, the bill of exceptions heretofore at the February term, 1884, signed and allowed by the court in this case." [Record pages 10 and 11.]

And that,

"Afterwards, to wit, on the 21st day of July, being a "day of the April term A. D. 1884, of said court, before "the Honorable Martin Welker, one of the judges of said "Court, the following order was entered in said cause in "said court, viz: * *

"And thereupon the defendant's motion for an order "*nunc pro tunc* heretofore filed at said April term, A. D., "1884, to wit, the 15th day of May, 1884, is heard and

"granted, and the clerk is ordered to file the bill of ex-"ceptions therein referred to now for then, as of the "said February term, A. D., 1884; to which order last "named the plaintiff then and there excepts."

It will be observed that in this order of the Circuit Court the motion "is heard and granted, and the clerk *is ordered to file the bill of exceptions therein referred to* now for then as of the said February term, A. D., 1884."

By referring to the language of the motion, [Record page 10.] it will be found that "the bill of exceptions therein referred to" was "*the bill of exceptions heretofore at the February term, 1884, signed and allowed by the court in this case.*"

The record which alone *imports verity*,—and *which alone* can advise this Honorable Court of the *fact*—witnesses, in the absence of any mention thereof in the journal entries of that term, *that no bill of exceptions whatever was signed or allowed at said term.*

The clerk, however, purporting to act in pursuance of the authority conferred by the order of court just referred to, assumed and undertook to file, on the 21st day of July, 1884, "*as of the February term, 1884, under order of July 21st, 1884,*" as the bill of exceptions "referred to" in said motion, the paper which is alleged and claimed to be the "Defendant's Bill of Exceptions."

It will be observed, however, that the motion contains no request to have the bill of exceptions therein referred to made a part of the record, and that the Circuit Court in its *nunc pro tunc* order, simply grants the motion, and directs "the bill of exceptions therein referred to" to be

filed "now for then as of the said February term, A. D. 1884;" *but nowhere authorizes or directs it to be made part of the record.*

If, therefore, it be true, as announced by the Honorable Supreme Court of Ohio, in the case last cited, that "Before a paper purporting to be a bill of exceptions can be treated as such, *it must appear from the record, outside of such paper*, that a bill of exceptions was, *in due time*, tendered to, and allowed, signed, and sealed by the court, *and made part of the record*, and the paper in question must be identified, with reasonable certainty, as *the* bill of exceptions *which was thus made part of the record*," then, we respectfully submit, this Honorable Court will not consider the paper in question as a bill of exceptions, but will wholly disregard it in determining the case at bar. And if so, the conclusion is inevitable, —the evidence in the case not being before your Honors, "the questions made in argument by counsel do not arise," and this honorable Court "can but affirm the judgment" of the Circuit Court.

Our position in this regard is also sustained by the rule in the cases of,

Muller vs. Ehlers, 91 U. S. 249, and
Hunnicut vs. Peyton, 102 U. S., 333.

2. The evidence claimed to be incompetent,—and which was withdrawn from the consideration of the jury.—was relevant as part of the res gestæ.— even though it disclosed the immediate repair of the defective road-bed by the road-master and section-foreman.

It will be observed, that the testimony in question was confined to circumstances and transactions so nearly con-

nected with the time, place, and occurrence of the injury complained of by the defendant in error, and so inseparable from it as to constitute part of the *res gestæ*. Had the context of the testimony set forth in the alleged bill of exceptions been inserted in full therein, as in all fairness, we submit, should have been done, the relevancy of the part set forth would more fully appear, and the connection of its subject matter with the transaction as part of the *res gestæ*, be clearly established.

In the first case cited by us on this subject, *Morse vs. Ry. Co., 30 Minn., 465,* it was sought to show, that the defendant repaired or changed the switch, alleged to have been defective, over one year after the accident, and after it had been removed to another place. This the Honorable Supreme Court of Minnesota, overruling the former holdings of that Court in that regard, held to be incompetent, and then, on page 468, announced the true rule in regard thereto, as we claim it to be, as follows:

"But, if competent, such evidence is only so as an "admission of the previous unsafe condition of the thing "repaired or removed, and, *to render it admissible as* "*such*, the act must have been done so soon after the "accident, and under such circumstances as to indicate "that it was suggested by the accident, and was done to "remedy the defect which caused it. All courts *who* "admit the evidence at all so hold." * * *

It is true the Court state that, on reflection, the evidence should not be admitted at all, and add, in support of the conclusion reached, that

"A person may have exercised all the care which the "law requires, and yet, in the light of his new experi-

"ence, after an unexpected accident has occurred, and as "a measure of extreme caution, he may adopt additional "safeguards."

In such case, as is suggested by that Honorable Court, we do not, of course, claim the evidence would be competent or admissible. *But in the case at bar,—where the evidence shows conclusively that the plank in question between the rails of the track, at a public highway crossing, upon the main street of a village, was permitted, with full knowledge of the fact, to remain for months in a ragged, loose, and insecure condition, and so far out of place as to leave a space between it and the rail of the track of from three and a half to four inches in width,—there is established such a condition of things as would carry notice to the minds of the most ordinary persons—however unfamiliar with the construction of railroads they might be—that its unnecessary continuance for a single hour would be negligence of the grossest and most reprehensible character.* In such a case—wherein the verdict of the jury is based upon the facts stated, we submit, there can be suggested no possibility of injustice resulting from its admission, and no reasonable ground for its exclusion.

All of the other cases cited by us on this question, we confidently submit, sustain fully our contention in this regard.

In the case of *Casey vs. Ry. Co., 78 N. Y., 518,* wherein the same question was raised, the Honorable Court of Appeals of New York say, on page 523:

"The testimony of the witness McLeary, as to what "occurred after the accident, was properly admitted. "It was merely following up the evidence which had "previously been given by the same witness, and con-

"stituted part of the transaction. *No improper use could "lawfully be made of such evidence, and the court, if "called upon, would no doubt have instructed the jury "accordingly."*

In the case at bar, the Circuit Court not only instructed the jury in that regard, but went to the full extent of withdrawing fully all of the evidence complained of from the consideration of the jury, in the language following:

"* * That being the general rule in principle, then "the section-foreman could not do anything that would "bind the company, and, therefore, *that line of testimony "presented before you, will not be considered by you as "a circumstance to prove that its railroad track was not "in a reasonably safe condition at the time; it is not to "be so regarded by you.*"

Again, there was other competent *prima facie* evidence on the same point in the case, and, therefore, under the rule in the cited case of *Cooper vs. Coates, 21 Wallace, 105,* there can be no ground for reversal of the judgment.

3. The Circuit Court did not err in its charge to the jury.

The only allegation of error in the Circuit Court's charge to the jury, to which the attention of this Honorable Court is invited in the brief of the learned counsel for the plaintiff in error, aside from the instructions regarding the evidence alleged to have been improperly admitted, is to the effect;

1st. That the court erred in refusing to charge the sixth request of counsel for the defendant below, which request was in the language following, to-wit;

"VI. Neglect on the part of a fellow servant to search "for and correct a defect if one existed at said crossing, "is such a risk as is included in the risks assumed by "plaintiff in entering into defendant's *servants*."

And,

2ndly. That the court erred in instructing the jury as follows:

"A brakeman by the terms of his employment * * "takes all the ordinary risks of his place and also the "risks of the carelessness and negligence of his co- "laborers employed and engaged in the same common "employment, [and same department of duty connected "with the operation of the railroad. His fellow brake- "men on the train, also the fireman and engineer are "in law regarded as his co-laborers. The conductor on "the train is his superior, and he does not take the risk "of the carelessness of his conductor, but he does take "the risk of the other class of men that are denominated "his co-laborers.]"

The defendant below excepted only to the part embraced within the brackets, and also to the following further charge of the court:

"Now a railrod company may entrust this duty (i. e., "to keep the track safe) to others, a road-master or a "section-foreman, but it cannot by so doing escape the "responsibility for its negligent performance. The acts "of its agents in this regard are its acts. * * * It "was claimed by defendant's counsel in argument that "this section-foreman was a co-laborer with this plaintiff "and if any injury resulted from carelessness, it was the "carelessness of the section-foreman, or the road-master. "You will see that these instructions do not sustain the "doctrine as claimed by counsel for this defense, but on "the other hand that the Railroad Company is required

"to perform — to see that this diligence is exercised "by men who may be entrusted with the duty of keep- "ing the railroad track and machinery in order." (Brief for plaintiff in error, page 9.)

In the language of their brief, (page 10) the only error complained of by the learned counsel, or sought to have regarded, (except as above noted) is:

"That the Court erred in directing the jury that the "defendant was not entitled under the evidence to re- "quire plaintiff to assume the risk arising from the neg- "ligence of the road-master or section boss, as that of a "colaborer or fellow servant."

We respectfully submit that there is no error in the charge of the Circuit Court in this regard, and contend that its instructions to the jury are in full accord with the rule of the common law which has not only been followed in the ablest and most authoritative decisions of the courts of last resort of the several States, but, in a series of most profoundly considered and adjudicated cases, has been uniformly recognized and applied by this Honorable Court itself,—even in all of the cases cited by the learned counsel for the plaintiff in error.

The citation of the case of *Farwell vs. Railroad Co., 4, Metcalf, 49,* as the leading case in America, in support of the claim of the plaintiff in error, only illustrates upon what slender thread the learned counsel are willing to suspend their case, even before so exalted a tribunal as this. They have failed to recognize the clearly defined distinction between the marked features of that case and those of the one at bar; in fact, the underlying principle of the rule in the cited decision, we submit, has been ignored or wholly lost sight of in its

attempted application to the case now under consideration.

The facts of the cited case, as stated in the second paragraph of the syllabus, were as follows:

"A railroad company employed A., who was careful "and trusty in his general character, to tend the "switches on their road; and after he had been long in "their service, they employed B., to run the passenger "train of cars on the road; B, knowing the employment "and character of A. *Held*, that the company were "not answerable to B. for an injury received by him, "while running the cars, in consequence of the careless-"ness of A. in the management of the switches."

While it is true that upon an agreed statement of facts—fully setting forth all the circumstances of the case—the Court held that the defendant company was not liable, it was exceedingly careful not only not to deny or ignore the rule for which we contend, but, clearly, and with remarkable terseness, stating the distinguishing features of the case before it for adjudication, which, in the judgment of the Court—somewhat hesitatingly declared—carried it beyond its application, recorded its recognition and approval of the rule itself, in the following admirable language: [Page 61.]

"In coming to the conclusion that the plaintiff in the "present case, is not entitled to recover, *considering it* "*as in some measure a nice question*, we would add our "caution against any hasty conclusion as to the applica-"tion of this rule to a case not fully within the same "principle. It may be varied and modified by circum-"stances not appearing in the present case, in which it "appears that no *wilful or actual negligence was im-*"*puted to the corporation, and where suitable means were* "*furnished and suitable persons employed to accomplish*

"*the object in view. We are far from intending to say* "*that there are no implied warranties and undertakings* "*arising out of the relation of master and servant.* "Whether, for instance, the employer would be respon- "sible to an engineer for a loss arising from a defective "or ill constructed steam engine: Whether this would "depend upon an implied warranty of its goodness and "sufficiency, or upon the fact of wilful misconduct, or "gross negligence on the part of the employer, if a "natural person, *or of the superintendent or immediate* "*representative and managing agent, in case of an incor-* "*porated company* — are questions on which we give no "opinion. In the present case, *the claim of the plaintiff* "*is not put on the ground that the defendant did not* "*furnish a sufficient engine, a proper railroad track, a* "*well constructed switch, and a person of suitable skill* "*to attend to it; the gravamen of the complaint is, that* "*that person was chargeable with negligence in not* "*changing the switch in the particular instance,* by "means of which the accident occurred, by which the "plaintiff sustained a severe loss. It ought perhaps to "be stated, in justice to the person to whom this negli- "gence is imputed, that the fact is strenuously denied "by the defendants, and has not been tried by the jury. "By consent of the parties, this fact was assumed with- "out trial in order to take the opinion of the whole court "upon the question of law, whether, if such was the fact, "the defendants, under the circumstances, were liable. "Upon this question, supposing the accident to have "occurred, and the loss to have been caused, by the "negligence of the person employed to attend to and "change the switch, *in his not doing so in the particular* "*case*, the court are of the opinion that it is a loss for "which the defendants are not liable, and that the action "cannot be maintained."

Your Honors will not have failed to observe the degree of extreme caution and care with which the

Honorable Supreme Judicial Court of Massachusetts sought to limit and confine its ruling, throughout the entire *dictum*, to the special and specific features and admitted circumstances of the case before it. Lest some specious reasoner should be able to pervert its logic to the misapplication of the doctrine advanced, that Honorable Court planted itself firmly upon ground so limited by the peculiar circumstances, and intrenched by the distinguishing features of that particular case, as in no manner to jeopard or contravene the recognized rule of law, that no master—however powerful—derelict in any of his primary duties to the humblest of his servants, shall ever find refuge or immunity in the delegation of responsibility to subordinates in a common service.

The distinguishing features of the case referred to being so very apparent, we can but ask the pardon of this Honorable Court for further recital of them.

There was no charge that the defendant company had been remiss or derelict in regard to any one of its primary duties toward the complainant. For the purposes of that case, it was substantially admitted:

1. That the engine originally furnished for the use of the complaining engineer was sufficient in all of its parts, and up to the moment of the injury had been kept and maintained in perfect repair.

2. The road bed and track upon which the engine was required to be used, were properly constructed, and up to the time of the injury, had been maintained in good and perfect repair.

3. The switch, bar, and all attendant apparatus connected and intended for use therewith, were sufficient

as originally provided, and had been maintained, up to the time of the accident, in proper repair.

4. Due and reasonable care had been exercised in the selection of a proper person as attendant and operator of the switch, and who had not theretofore been known to have been negligent or incompetent.

Thus all of the proper instrumentalities had been furnished and continuously maintained, and up to the very moment of the occurrence complained of, the defendant company had never had notice, or the means of knowledge, by precedent or otherwise, of any negligence or incompetency on the part of the operator of the switch, to whose negligence in the act of operating the same, it was admitted, for the purposes of the case, the occurrence of the injury to the engineer was directly due. Hence at the very instant of the occurrence complained of, the defendant company stood acquitted of all dereliction in the discharge of these great primary duties, for the proper discharge of which the master is at all times directly responsible,—no matter how, when, to whom, or for what purpose he may have delegated them, or any of them.

Had the injury resulted from an original defect in the construction of the engine,—which was known, or ought to have been known to the defendant company, and unknown to the engineer; or from the failure of the company to maintain the same in proper repair; or from a like defect in the construction of the road-bed or track; or a like failure to maintain the same in proper repair; or from such defect in the switch or attendant apparatus, or the failure to keep them in such repair; or from the negligent or incompetent act of an operator of the switch,

in the selection of whom the company had been guilty of negligence, or whose prior negligent or incompetent acts, known to the company and unknown to the engineer, had demonstrated his disqualification or unfitness for the proper discharge of so important and responsible a duty,—in any of the events stated, the liability of the defendant company to answer in damages could never have been avoided. Aye, the rule of law in this regard is even broader than we have just stated, in this, that had the injury even been directly due to negligence in operating the switch, on the part of the operator in whose selection proper care had been exercised, and any defect or want of repair in the engine, road-bed, track, switch, or attendant apparatus, known, or which ought to have been known to the defendant company, and unknown to the engineer, in any manner directly contributed thereto, as the proximate cause thereof, the defendant company would even then have been held liable.

Ellis vs. Ry., 95 N. Y., 546.
Railway Co. vs. Cummings, 106 U. S., 700.
Elmer vs. Lock, 135 Mass., 575.
Ry. Co. vs. Herbert, 116 U. S., 642.

The rule thus recognized in the celebrated leading case to which we have adverted, has, since 1843, been uniformly recognized and followed in the courts of Massachusetts, until, in deciding the late case of *Holden vs. Fitchburg Railroad*, 129 *Mass.*, 268, the Supreme Judicial Court of that State, after citing the former case, on page 276, say :

"By subsequent decisions, it has been settled that *the "master, whether a natural person, or a corporation, is "bound to use reasonable care in selecting his servants, and*

"*in keeping the engines with which, and the buildings,*
"*places and structures in, upon or over which his business*
"*is carried on, in a fit and safe condition, and is liable to*
"*any of his servants for injuries suffered by them by reason*
"*of his negligence in this respect.*"

(Chief Justice Gray delivered the decision in the case.)

Perhaps the most profound and interesting discussion of the question appearing in any of the leading cases of the more recent State reports, will be found in the opinion of the Honorable Supreme Court of Vermont in the case of *Davis vs. Railroad Co.*, **55** *Vermont*, **84**. A statement of the facts in the case is embodied in the opinion, on page 87, as follows :

"The declaration charges, that on the above named "day, the defendant was operating the Rutland Railroad "as lessee; that the intestate was in its service as loco-"motive fireman on the passenger trains passing over "the railroad ; *that thereupon it became and was the duty* "*of the defendant to keep and maintain a sufficient and* "*safe road-bed and track*, and to use due and proper skill "and care in furnishing and maintaining a suitable and "sufficient roadway for the passage of its passenger "trains ; and *that the defendant so negligently and care-*"*lessly performed its duty in this respect that the road-bed* "*became washed away, and the intestate thereby killed.*
"This is the substance of the several counts in the decla-"ration. The evidence showed that the accident oc-"curred near Bartonville, on the Rutland Railroad, and "was caused by the washing out of a culvert.

"The plaintiff claimed and gave evidence from "which the jury have *found that the culvert was in an* "*improper condition resulting from the negligence and* "*carelessness of the road-master, bridge builder, and sec-*"*tion boss.* The culvert had been washed out two or "three times before. The last time before that occa-

"sioning the accident was by the freshet of 1869. It "was then rebuilt by the bridge-builder of the Rutland "Railroad Company, or of the trustees who were oper- "ating it, *and the embankment over it was constructed by "the road-master of the same.* The plantiff claimed and "gave evidence tending to show that, in constructing "the culvert the bridge-builder carelessly and negligently obstructed it by constructing an improper stockade of piles on the upstream side to prevent the "driftwood and brush from being carried into the "culvert by the brook that flowed through it, and *that "the road-master carelessly and negligently constructed "the embankment above the culvert*, which was washed "away on the occasion when the intestate received his "injuries—of loose and improper material. She also "claimed and gave evidence tending to show *that the "defendant through its bridge-builder and road-master, "had carelessly and negligently allowed these defects to "remain* during all the years it had been operating the "road, and also *that its section-boss had carelessly and "negligently allowed the stockade to become partially "filled and clogged so that it further obstructed the pas- "sage of the water.* The testimony further tended to "show that the washout of the embankment above the "culvert was occasioned by the stockade holding back "the water so that it rose and ran over the embankment and washed out the loose and improper materials "of which it was constructed. *It was not claimed by the "plaintiff but that the defendant's bridge-builder, road- "master, and section-boss were ordinarily skillful and "careful men in their several employments, nor that the "defendant was guilty of any negligence in selecting and "employing them.* The plaintiff's evidence further tended "to show that *the defendant entrusted the construction "and maintenance of all the bridges and culverts on that "division to the bridge-builder;* and *that the construction "and maintenance of the track and roadbed of that divi-*

"*sion was entrusted to its road-master, who had under him* "*section-bosses, each of whom had under him a gang of* "*section men and had under the road-master the care of* "*about five miles of the track and roadbed. The plain-* "*tiff in the trial court contended that the negligence of* "*the bridge-builder and road-master in caring for the* "*culvert and in failing to keep the same in proper* "*repair, both in regard to the improper construction* "*and continuance of the stockade and embankment above* "*it, was in law the negligence of the defendant, and* "*the County Court in substance so held and instructed the* "*jury.* The correctness of this holding and instruction "is the principal question involved in the decision of "this case. The other contentions of the defendant "that the declaration should have alleged that it had "notice of the defects in the culvert and embankment "and that the evidence of notice to its bridge-builder "and road-master of the defects was improperly ad- "mitted, depend upon whether the bridge-builder and "road-master so far stood in the place of the defendant "in regard to its duty and negligence to the intestate, "that their knowledge of the defects and negligence in "regard thereto were in law the knowledge and negligence of the defendant. The defendant contends that "the bridge-builder, road-master and section-boss were "the fellow-servants of the intestate in running its trains "and operating the road, and that their negligence and "want of care are not in law imputable to it; that it is "not liable for the consequences thereof to the intestate "or his representatives; and that the consequences of "such negligence were one of the risks which the intest- "ate assumed when he entered upon the employ- "ment."

Then, after a somewhat lengthy review of the more important American and English authorities, the Honorable Court declare, on page 92 :

"The doctrine now established by the United States "Supreme Court, and by most of the courts of last re- "sort in the several States, holds the master liable to his "workman for injuries sustained from the negligent per- "formance of duties which rest, by the relation upon the "master, *whether* the master performs such duties person- "ally or through an agent or servant. Says Mr. Wheaton "in his work on Agency, s. 232: 'It is important to re- "'member, that the master is liable, *where the negligence* "'*of the offending servant was as to a duty assumed by the* "'*master as to working-place and machinery.* * * It "'is not enough for him to employ competent workmen "'to construct his apparatus. If an expert, he must in- "'spect their work, and if not, he must employ another "'competent person as expert for the purpose. If such, "'however, is his duty, *he must not only see that the struc-* "'*ture he provides is suitable at the outset, but that it is* "'*kept in repair, and the repairer's negligence in this re-* "'*spect is the master's negligence.*'"

The Honorable Court then citing *Pierce on Railroads, Hough vs. Ry. Co., 100 U. S., 213, and Holden vs. Fitchburg Ry. Co.,* (*supra.*) thus conclude, on page 94:

"When the case of *Hurd vs. The Vt. & Canada R. R.* "*Co.,* (*supra.*) was decided, the liability of the master was "held to be dependent upon whether the servant whose "negligence caused the injury and the servant injured "were fellow-servants in a common employment or work. "* * * * *But this test while determinative in a great* "*number of cases, as we have seen, it has been abandoned,* "*both in England and this country, and in lieu thereof the* "*master's liability has been made to rest upon whether the* "*negligence arose in the performance of a duty for the care-* "*ful discharge of which he became responsible when he as-* "*sumed the relation of master to the injured servant.* On "these principles which we think furnish the true ground "upon which the master's liability, and on the American

"application of them, the charge of the County Court in "the particulars to which exceptions were taken contains "no error. The American doctrine holding the master "liable for the negligence of his servant while discharg- "ing a duty which the master owes to a general work- "man is more consonant with reason and the general "safety of the traveling public than the English doctrine "announced in *Wilson vs. Merry*, (*supra.*) *The bridge-* "*builder and road-master while inspecting and caring for* "*the defectively constructed culvert, were performing a duty* "*which as between the intestate and the defendant it was the* "*duty of the defendant to perform. Their negligence therein* "*was the negligence of the defendant. Being the agents of* "*the defendant for the performance of these duties, notice to* "*them in regard to the defective construction of the stockade* "*as affecting the safety of the culvert, was notice thereof to* "*the defendant. Hence the evidence to show such notice to* "*them was properly admitted.* * * The charge of cul- "pable negligence impliedly charged this defendant with "knowledge of the defects."

In the logical reasoning of Mr. Justice Harlan, in delivering the opinion of this Honorable Court in the case of *Hough vs. Railroad Co., 100 U. S., 213*, which was followed in the Vermont case last cited, the rule is stated with admirable clearness, on page 218, in the following terms:

"A railroad corporation may be controlled by compe- "tent, watchful, and prudent directors, who exercise the "greatest caution in the selection of a superintendent or "general manager, under whose supervision and orders "its affairs and business, in all of its departments, are "conducted. The latter, in turn, may observe the same "caution in the appointment of subordinates at the head "of the several branches or departments of the company's "service. *But the obligation still remains to provide and* "*maintain, in suitable condition, the machinery and appar-*

"*atus to be used by its employes,—an obligation the more* "*important, and the degree of diligence in its performance* "*the greater, in proportion to the dangers which may be* "*encountered.* Those, at least, in the organization of the "corporation, who are invested with controlling or super- "ior authority in that regard represent its legal person- "ality; their negligence, from which injury results, is the "negligence of the corporation. The latter cannot, in "respect of such matters, interpose between it and the "servant, who has been injured, without fault on his part, "the personal responsibility of *an agent who, in exercis-* "*ing the master's authority, has violated the duty he owes,* "*as well to the servant as to the corporation.*

"To guard against misapplication of these principles, "we should say that the corporation is not to be held as "guaranteeing or warranting the absolute safety, under "all circumstances, or the perfection in all of its parts, of "the machinery or apparatus which may be provided for "the use of the employes. *Its duty in that respect to its* "*employes is discharged when, but only when, its agents* "*whose business it is to supply such instrumentalities,* "*exercise due care as well in their purchase originally, as* "*in keeping and maintaining them in such condition as to* "*be reasonably safe for use by employes.*"

In following their citation of *Farwell vs. Railroad Co.*, in the 4th of Metcalf, with the case of *Randall vs. R. R. Co., 109 U. S., 478*, and the application they seek to make of the principles therein enunciated by this Honorable Court, the learned counsel for the plaintiff in error have been singularly unfortunate in failing to discern or recognize the underlying philosophy of the decision, and its entire harmony with the rule which we seek to have applied to the case at bar.

In that case, the plaintiff, a brakeman whose duties required him to draw the switch-bar in the yard of the

defendant company, where there were a great number of tracks, to allow his train to pass on to another track, was, while so drawing the bar of the switch, struck and injured by an engine upon an adjoining track. His declaration charged negligence in the construction of tracks in too close proximity to each other, and in the employment of a careless engineer, etc.

It appears from the statement of the case, on page 481, that:

"There was no evidence that the tracks were im-
"properly constructed, or that the engineer was unfit
"for his duty. The other grounds of action relied on
"were improper construction and arrangement of the
"switch; negligence of the defendant in running its
"engine, by an unskilful and negligent engineman,
"alleged to have been engaged in a different service
"for the defendant from that in which the plaintiff was
"engaged; and omission to comply with the require-
"ments of the Statute of West Virginia.

"At the close of the whole evidence (of which all that
"is material is above stated), the court directed the jury
"to return a verdict for the defendant, because the
"evidence was such that if a verdict should be returned
"for the plaintiff, the court would be compelled to set it
"aside."

Mr. Justice Gray in delivering the opinion of this Honorable Court in that case, affirming the judgment of the Circuit Court, most forcibly states:

1. "It is the settled law of this Court, that when the
"evidence given at the trial, with all the inferences that
"the jury could justifiably draw from it, is insufficient to
"support a verdict for the plaintiff, so that such verdict,
"if returned, must be set aside, the court is not bound
"to submit the case to the jury, but may direct a verdict

"for the defendant. * * And it has been decided by "the House of Lords, upon careful consideration of the "previous cases in England, that it is the duty of the "judge to say whether any facts have been established "by sufficient evidence, from which negligence can be "reasonably and legitimately inferred; and it is for the "jury to say whether from those facts, when submitted "to them, negligence ought to be inferred.

"Tried by this test," continues Mr. Justice Gray, "*there was no sufficient evidence of negligence on the* "*part of the railroad company in the construction and* "*management of the switch to warrant a verdict for the* "*plaintiff on that ground.* The testimony of plaintiff "and his witnesses was too slight. A railroad yard, "where trains are made up, necessarily has a great "number of tracks and switches close to one another, "and any one who enters the service of a railroad cor- "poration, in any work connected with the making up "or moving of trains, assumes the risk of that condition "of things. Although it was night, and the plaintiff "had not been in this yard before, his lantern afforded "the means of perceiving the arrangement of the switch "and the position of the adjacent tracks. The switch "was of a form in common use, and was, to say the "least, quite as fit for its place and purpose as an upright "switch would have been. It could have been safely "and efficiently worked by standing opposite the lock, "midway between the tracks, using reasonable care; "and it was unnecessary, in order to work it, to stand, "as the plaintiff did, at the end of the handle, next the "adjacent track."

Thus it clearly appears, that this Honorable Court based its judgment exonerating the defendant company solely upon the fact that there was no evidence to show that the company, or any of its servants or agents had been remiss in the discharge of any of its primary duties toward the injured servant.

The tracks and roadbeds, the switch and attendant apparatus, and the engine which struck the plantiff, were all properly constructed, suitable, and in proper repair; and the engineman suitable and properly selected.

These facts were doubtless dwelt upon by this Honorable Court in order that it might appear the more clearly, that if the injury were in any manner attributable to the negligence of any of the defendant's servants, it must have been in the discharge of duties *other than "those which the master owes to the general workman,"* as was so forcibly stated by Mr. Justice Gray, when Chief Justice of the Supreme Judicial Court of Massachusetts, in the cited case of *Holden vs. The Fitchburg Ry. Co.*, and which this Honorable Court in the case of *Randall vs. R. R. Co.*, to which reference has been made, defined to be,—"*to provide and maintain, in suitable condition, "the machinery and apparatus to be used by its em-"ployes.*"

Had the negligence causing the injury been in regard to the discharge of any of these last stated *primary* duties, the negligence of its servants in that regard would have been the negligence of the defendant company, in respect of which, say this Honorable Court, "*the latter cannot "* * * interpose between it and the servant, who has "been injured, without fault on his part, the personal "responsibility of an agent who, in exercising the master's "authority, has violated the duty he owes, as well to the "servant as to the corporation.*"

In other words, the injury to one servant, resulting from the negligent use or operation by another, whose selection and retention have been proper, of proper and suitable machinery or instrumentalities furnished, and

maintained in proper repair by a common master, is among the risks assumed by the servant in entering with others into a common service; and that fact constitutes the distinguishing feature of the common master's nonresponsibility therefor. Nevertheless, in the better language of Mr. Justice Field, in delivering the opinion of this Honorable Court in the case of the *Railroad Co. vs. Ross, 112 U. S., 377.*

"However this may be, it is indispensable to the em-
"ployer's exemption from liability to his servant for the
"consequences of risks thus incurred, that he should
"himself be free from negligence. He must furnish the
"servant with the means and appliances which the serv-
"ice requires for its efficient and safe performance,
"unless otherwise stipulated; and if he fail in that respect,
"and an injury result, he is as liable to the servant as he
"would be to a stranger. In other words, whilst claim-
"ing such exemption he must not himself be guilty of
"contributory negligence."

We submit further, that the failure of the learned counsel for plaintiff in error to fully discern between the distinguishing features of the cited case of *Randall vs. Ry. Co.*, in the 109th U. S., and those of the *Railroad Co. vs. Ross*, in the 112th, to which reference has just been made, becomes even more apparent in their attempted application of the rule in the former to the principles of the latter, and especially in their unfortunate misquotation of the text of this Honorable Court's opinion in the case last referred to, as set forth on page 13 of the printed brief, in the terms following:

"We agree with them in holding—and the present
"case requires no further decision—that the conductor
"of a railroad train who commands its movements, directs

"when it shall *stand*, at what stations it shall stop, at "what speed it shall run, and has the general manage- "ment of it, and control over the persons employed upon "it, represents the Company, and therefore, that for in- "juries resulting from his negligent acts, the Company "is *not* responsible."

Though far from attributing the misquotation to any design on the part of either of the learned counsel, it is apparent that the interpolation of the word "*not*"—which so signally and significantly changes the entire sense of the language used by this Honorable Court—could only have resulted from too cursory an examination of the cited case, and the principles involved in the decision therein, for purposes of legitimate research and logical application in argument of the case at bar.

Without further comment, we pass to their concluding consideration of the recent case of the *Railroad Co. vs. Herbert, 116 U. S., 642.*

No slight degree of self-assurance was required on the part of the learned counsel, to stand in the august presence of this Honorable Court, and entirely ignoring the distinguishing features of the cited case of *Randall vs. The Railroad Co.*, and the clearly defined principles involved therein, and commenting upon the action of the Court in making no reference thereto,—captiously inquire: (Page 13 of brief.)

"If the decision in the 116th U. S. (supra.) was de- "signed to modify the rule laid down in the 109th U. S., "we are led to inquire why attention was not called to "such modification." And then, with an emphasis approaching effrontery, seek to interpose "the special "statutes of Dakota" as a shield against the application

of the rule in the cited case of the *Railroad Co. vs. Herbert*, to the case at bar.

In this last cited case, the plaintiff, Herbert, a brakeman in the service of the defendant company, sought to recover damages for injuries to his person, caused by defective machinery, negligently provided for his use by the defendant. By its answer the defendant contended that the plaintiff was a fellow-servant of the officer or agent of the company, who was charged with the duty of keeping the cars in order, and, therefore, could not recover against the company for injuries suffered by reason of the latter's negligence, *and that this exemption from liability is declared by the statute of Dakota.*

It is difficult to understand how the learned counsel could so far misapprehend the ground upon which the judgment of the trial court was affirmed by this Honorable Court, in the case referred to, as to declare, on page 13 of their brief:

"Here the Court, by divided opinion, held, p. 625, "that such superintendent of repairs was, so far as that 'duty was concerned, a representative of the Company, "and his negligence was its negligence; and that *under "the special Statutes of Dakota,* the master of repairs is "not a fellow-servant with a brakeman."

This Honorable Court was far from being divided in opinion when, on page 648, the rule announced by the full bench in the case of Hough vs. Railway Co., 100 U. S., 213, was applied in the following terms:

"* * It was substantially declared in the recent "case of *Hough vs. Railway Co.,* * * where we said "that, notwithstanding a railroad corporation may be "controlled by competent, watchful, and prudent direc-

"tors, and care and caution exercised in the selection "of subordinates at the head of the several branches of "its service, its obligation still remains to provide and "maintain in a suitable condition the machinery and "apparatus to be used by its employes; and that 'it can-"'not, in respect of such matters, interpose between it "'and the servant who has been injured, without fault "'on his part, the personal responsibility of an agent, "'who, in exercising the master's authority, has violated "'the duty he owes, as well to the servant as to the "'corporation.'"

It clearly appears, we submit, that the only point of division in the opinion referred to was, as to whether the recognized rule of the common law should prevail notwithstanding the interposition of "*the special Statutes of Dakota*," which sought to limit and restrict the liability of the employer. A majority of the Court were of the opinion that it should, and so decided, affirming the judgment of the Supreme Court of Dakota.

Wherefore, in view of the rule so uniformly and continuously recognized and applied in the cases cited, as well by the courts of last resort in the several States as by this august Court, we submit, that, in the case at bar, the Honorable Circuit Court did not err "in direct-"ing the jury that the defendant was not entitled under "the evidence to require plaintiff to assume the risk "arising from the negligence of the road-master or "section-boss, as that of a co-laborer or fellow-servant,"— and that in this regard its judgment should be affirmed.

Respectfully,

EDWARD S. MEYER,

Attorney for Defendant in Error.

[redacted]

IN THE

Supreme Court of the United States.

[redacted]

[redacted]

[redacted]

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Attorney for Defendant in Error.

IN THE

Supreme Court of the United States.

October Term, 1887.

No. 66.

The N. Y., L. E. & W. R. R. Co.,
Plaintiff in Error.

vs.

GEO. R. MADISON,
Defendant in Error.

ARGUMENT IN REPLY,

—BY—

J. E. INGERSOLL and L. A. RUSSELL,
Attorneys for Plaintiff in Error.

IN THE

Supreme Court of the United States.

October Term, 1887.

No. 66.

The N. Y. L. E. & W. R. R. Co., Pltff. in Error,

vs.

GEORGE MADISON, Deft. in Error.

ARGUMENT IN REPLY.

The learned counsel for defendant in error make some statements as to what appeared in evidence showing that the crossing where Madison's foot was caught had been for some months much out of repair. (p. 3. deft's brief.)

If there were any question before this honorable Court dependent upon the evidence in that particular, we should take issue with the learned counsel on this point, as well as upon the evidence which he claims (p. 4 of the brief) was elicited from the section foreman King by his cross-examination; and even if the evidence shows the width of the opening between the plank and the rail to be as our opponent claims, we should maintain in regard thereto.

That there be a slot or space between the rail and the planking at the highway grade crossings of railroad tracks

is *inevitable* as the locomotive driver wheels and all other wheels have flanges which *must* in such slot find passage room.

Every such slot *must* be wide enough and narrow enough to catch the feet, if inserted therein, of very many human beings; such is the variety in width of human feet and their covering of shoes and boots.

The slot in question was wide enough to catch the boot of the Defendant in error when he inserted it therein. It was also narrow enough to have its edge next the rail worn and frayed by the rubbing against it of the flanges of passing wheels.

If it had been narrower the car wheels could not have passed in safety. If it had been wider Madison's foot would not there have been caught, but a horse's foot might and probably would have been.

Is the railroad's liability to be fixed by the width of the brakeman's shoe?

Defendant in error complains that space was too wide. Proof was that cars of different gauges of wheels had here continually to pass.

But without further argument upon this phase of the case, we proceed at once to notice those portions of the argument of the learned counsel for defendant in error which concern the points of error made upon the record and relied upon by plaintiff in error.

I.

It is argued that we have no sufficient Bill of Exceptions.

On p. 6. of the brief of our learned opponent he says.

"It is true there is a paper attached to the transcript having "the form of and purporting to be a bill of exception, but it "*appears by the record* that the paper in question *was not* "*signed or sealed* by the judge—if signed or sealed at all— "*until some time after the term at which the cause was tried.*"

We think a careful examination of the record will show that our learned friend is clearly mistaken in this statement, and that he confounds the *filing* of the bill of exceptions with its *allowance* and *signing* by the trial judge.

It will be seen that such *signing* and *allowance* of the bill of exceptions was completed at the term when the case was tried—*to-wit*, the February term 1884; but the *filing* of it was not done till the term next following, *to-wit;* the April term 1884, and then by an order of Court *nunc pro tunc* the bill of exceptions was ordered to be filed as of the term when the Court certifies it was allowed signed and sealed. On page 25 of the printed record we have the certificate of the clerk of the Circuit Court of the United States, for the Northern District of Ohio under seal of this court to the completeness of the transcript of record.

From this record we find (p.6.) the jury were empanelled February 20th, 1884, being a day in the February term 1884. (p. 7.) The verdict was rendered March, 5, 1884. (p. 7.) The motion for a new trial was filed March 8, 1884. (p.11.) Judgment is entered on overruling motion for new trial on July 21, 1884, being a day in the April term. Immediately following is this entry.

"And afterwards, to-wit; on a day of the February term, "A. D. 1884, the *following bill of exceptions* was *filed* is said "case in said Court, being so *filed* at the February term 1884, "under order of July 21, 1884, journal 13,458," referring to a journal entry found at the bottom of p. 60.

Then follows what the clerk has referred to in the foregoing order as the "following bill of exceptions," and he further identifies it by adding to his entry above copied, the words "viz, Defendant's Bill of Exceptions," and sets forth in the usual form a Bill of Exceptions, beginning with the recital that "on the 20th day of February, A. D. 1884, a day "of said term, this cause came on for trial before his Honor

"Judge Martin Welker, the District Judge of said District "Court, and a jury, and thereupon the said plaintiff offered in evidence, etc." And when a point is reached where objection is taken to testimony it is recited,

"Defendant objected, Court overruled the objection, and defendant *then* and *there* excepted."

Then follows the answer of the witness to the question objected to.

When the testimony was completed (Record p. 17), it appears there requests were presented to the Court by counsel for defendant below, and upon the rejection by the Court of specific requests, the defendant *then* and *there excepted;* as did defendant except to specific portions of the Judge's charge, and in closing up said Bill of Exceptions after the retiring of the jury and the return of their verdict, on p. 21, is further recited.

"And defendant *at the February Term, A. D. 1884,* of "said Court, presented *this its bill of exceptions to matters "occurring upon the trial of said cause* at said February term "to the Court, and prayed the Court to allow, sign and seal "the same, and *order the same to be made a part of the record* "in said cause, *which* is *accordingly done* as prayed, at *said "February Term, A. D. 1884.*

[SEAL.] M. WELKER."

We submit, that it here appears under the signature and seal of the trial judge and the certificate of the Clerk of the Court, that *this* Bill of Exceptions was *allowed, signed and sealed* by the Court *at the trial term,* (February term, 1884,) and although it was not for some reason *filed* at that term, yet thereafter at the next (April) term, for good reasons appearing to the Court, an order was made *nunc pro tunc,* directing it *to be filed as of the February term.*

Now the only question is, had the trial judge authority to make *such an order?*

The cases cited by the learned counsel for defendant in error we contend do not deny this power to the Court.

Let us first examine the cases from Ohio, cited by counsel, on the hypothesis that the Ohio practice would control the case.

27 O. S., 597. Hill vs. Bassett.

The Court, on p. 599, show what kind of a paper it had then to consider.

"Among the papers which in this case have been filed with, "and are attached to, the authenticated transcript of the "docket or journal, and of the final judgment rendered in "the Court of Common Pleas, we find a paper purporting on "its face to be a bill of exceptions, and to have been allowed "and taken on the trial of the case. *But it is not authenti-"cated by any certificate of the Clerk* as an original paper filed "in the case; nor is there anything in the record outside of "the paper itself, which shows, or in any way intimates, that "any bill of exceptions whatever was taken or attempted to "be taken on the trial."

On this state of facts, so plainly and materially different from that of the case at bar, the Court lays down this principle in the syllabus of the case; which under the rules of the Supreme Court of Ohio, covers *all* there is decided in the case.

"Before a paper purporting to be a bill of exceptions can "be regarded by a reviewing Court, upon error, as a part of "the record it must appear from the record outside of such "paper, that a bill of exceptions was in due time tendered to "and allowed signed and sealed by the Court and made part "of the record, and the paper must be identified with reason-"able certainty as the bill of exceptions which was then made "part of the record."

Now, all these conditions we say are fulfilled in the journal entries sent up under the certificate of the clerk of the Circuit Court for the Northern District of Ohio.

36 O. S. 614. Kerr vs. State.

The Court, on p. 624, gives the material facts there.

"The cause was tried, verdict rendered, motion for a new "trial overruled and sentence pronounced *at the October "term 1880.* In fact the case was finally terminated at that "term, but there was no entry made during, *or as of that "term* showing the signing of any bill of exceptions."

The syllabus reads—

7. "A bill of exceptions in a criminal case taken under "Revised Statutes §§ 5302, 7304, cannot be regarded as part "of the records unless it appears from the journal of the term "at which the cause was tried and terminated, that such bill "was signed during the term, or within thirty days there-"after."

The case at bar shows by a journal entry "as of the February term 1884" that the bill of exceptions was filed, which is identified by the clerk as the one here to be passed upon—

But we find a case in *37 O. S. 147, Boothe vs. R'y Co.*, which is more in point than either of the cases cited by our learned opponent—

The Court on p. 149 state the case thus—

"In the record of the case filed in the Court there was no "journal entry showing the allowing and signing a bill of ex-"ceptions, but the Court of Common Pleas of Auglaize "County has made an order *nunc pro tunc* showing that such "allowance was made and bill signed at the term the case was "heard and judgment rendered."

And on these facts the doctrine is announced in the syllabus as the law,—to-wit:—

1. "Where a bill of exceptions *was allowed and signed* "during the term at which the exception was taken, the "omission to set forth the fact in the journal of that term "may be supplied in that Court by an order *nunc pro tunc* "made at a subsequent term; and the bill of exceptions, trial "docket and entry of judgment are proper, and may be suffi-"cient evidence to warrant such order."

We have such an order forming part of the very journal entry that rendered the judgment and also the *nunc pro tunc* journal entry showing the filing as of the February term the

bill of exceptions which had been allowed and signed at the February term.

This shows our bill of exceptions sufficient under the decisions of the Supreme Court of Ohio.

A brief examination of some of the cases decided by this honorable Court determining what is a sufficient Bill of Exception will sustain the bill of exceptions in this case. *20 How. 252. United States vs. Breitling.* (p. 253). The facts show—

"That during the term of court the attorney for the "United States presented a bill of exceptions. The bill was "presented on Saturday before the court adjourned, which "was on Wednesday. On Monday morning the bill was "passed to the United States attorney with the request that "he submit it to opposing counsel. On the third day after "this the minutes were signed and the court adjourned. "(The Judge says) I heard nothing further from the bill till "the 9th or 10th of May, when it was presented by the plain-"tiff's attorney again, with the written objection of the at-"torneys of the defendant that it should [not] be signed "after the adjournment."

This statement, signed by the trial judge, was ordered by him to be attached to the bill of exceptions. This court proceed in considering the force of a rule that no bill of exceptions can be signed after the adjournment of the court for the trial term to say. (p. 254.)

"And it is always in the power of the court to suspend its "own rules or to except a particular case from its operation "whenever the purposes of justice require it. The attention "of the court has upon several occasions been called to this "subject and the rule established by its decision will be "found to be thus: *The exception must show that it was "taken and reserved by the party at the trial; but it may be "drawn out in form and sealed* by the judge afterward; and "the time within which it may be drawn out and presented "to the court must depend on its rules and practice, and on "its own judicial discretion."

And that Bill of Exceptions was sustained.

This doctrine is reaffirmed in *2 Black 568*, Dredge vs. Forsythe.

In the *15 How. 160, Phelps vs. Mayer*, it is assumed that the certificate of the judge who authenticates a bill of exceptions suffices to prove when and how it was taken.

93. U. S. 548. Stanton vs. Embrey Adm.

The statement of the case on p. 550 shows that on March 13th, 1873, the jury rendered verdict.

March 19th, 1873, motion for a new trial was overruled.

May 3d, 1873, the bill of exceptions was *signed* by the presiding justice, and *filed nunc pro tunc* Aug. 13, 1874. *fifteen months after it was allowed and signed.* On p. 555 the court announced the rule as stated in 20th How. 254 (*Supra*),

"That the *exception* must show that it was taken and re-
"served by the party at the trial; but it may be drawn out
"in form and signed or sealed by the judge at a later period."
. . . "Beyond doubt the record must show expressly or
"impliedly that the exception was taken and reserved by the
"party at the trial; but it is a mistake to suppose that it has
"ever been decided by this court that it must be drawn out
"and signed or sealed by the judge before the jury retire from
"the box. . . . It is always allowable if the exception is
"seasonably taken and reserved, that it may be afterwards
"put in form and *filed in the case pursuant* to the order and
"direction of the judge who presided at the trial."

"Apply that rule to the case before the court, and it is
"clear that the objection of the defendant in error is *without*
"*merit* as it appears by the record that the exceptions were
"'taken at the trial of the cause,' and thus the bill of excep-
"tions was signed by the judge at the request of the defend-
"ants and filed in the case *nunc pro tunc*, which brings the
"case within the settled practice of courts of error even if
"governed by the strictest rules of the common law."

In the *102 U. S. 333 Hunnicutt vs. Peyton* the bill of exceptions was not filed within five days after the close of the trial as the rule of court required (p. 353) nor was there any order *nunc pro tunc* for its filing as of such date and the court decide that such rule was only for the parties but not to control the judge (p. 353, bottom) and (on p. 359), that a *nunc pro tunc* order was not essential. In fact that

the only thing essential is, that the "exceptions were taken in fact before verdict and during the progress of the trial." p. 358.

We submit to your Honor that under these authorities we have a very creditable bill of exceptions.

It is further contended by the counsel for the defendant in error (p. 5 of his brief) in regard to this incompetent evidence allowed, of statement made by defendant's employes a few hours after the accident, that evidence

"Even if incompetent and improperly admitted its admis-
"sion would not constitute ground for reversal of judgment
"there being competent *prima facia* evidence in the case on
"the same point."

And upon p. 15 of the brief of our opponent he proceeds to set forth what he claims *some* of the evidence (not of the bill of exceptions) "shows *conclusively*." To this claim we reply as we have already suggested. We understand that this Honorable Court will only examine the points brought up by the bill of exceptions (Rule 4 of Supreme Court). If we are mistaken in this view, then we should take issue with our learned friend that there is no such evidence as he claims.

But further, the authority cited by him to support the principle above quoted from his brief does not, as we read it maintain this position—He cites.

21 Wal. 105. Cooper vs. Coates.

The Court considering an objection that incompetent evidence had been admitted, say:

"If we suppose the evidence to be stricken out, as request-
"ed, the result of the case must necessarily be the same."

And the court then pointed out other evidence not objected to which was quite sufficient to prove the point for the

establishing of which the objectionable evidence has been offered; and further remark:

"This was *prima facia* evidence of the delivery of the "iron as specified, *and no proof to the contrary being offered* "it became conclusive. The plaintiff's case is as well without "White's evidence as with it. The defendants suffer no "injury by its retention and have therefore no legal cause of "complaint."

In the case at bar, we think, as we have more fully argued in our former brief (pp. 5–8), the plaintiff below not being willing to leave the question of negligence dependent alone upon the position of the plank at the place where the accident occurred, thought it would add weight sufficient to make a clear preponderence in his favor if he should prove (1) that the R. R. Co. at once set about changing the state of things, (2) what its own workmen said about the improper condition of things, and the record no where shows that there was other sufficient evidence *uncontradicted*, to establish the negligence so claimed to exist.

We contend that when a defendant in error seeks to apply the principal that a court of error will not reverse a case because of the admission of improper evidence if there was other evidence tending to the same point, he is subject to this rule, that he must make it

"Appear *beyond a doubt* that the error complained of "neither did prejudice nor could have prejudiced the party "against whom the error was made."

We quote this rule as announced by the Honorable Court in *5 Wal. 796, Deery vs. Craig.*

The same doctrine is affirmed in *17 Wal. 630, Smith vs. Shoemaker*, in these words:

"When it is argued here that an error in the Court below "worked no injury to the party complaining, the fact that it "worked no injury must be made to appear *beyond question*. "If it is only seen by a mere preponderence of evidence and "the error is substantiated, the judgment must be reversed."

See also upon same point:

104 U. S., 625 (630), Moores vs Nat. Bank.
110 U. S., 47 (50), Gilman vs. Higby.
119 U. S., 99 (103), R'y Co. vs. O'Brien.

In further support of our contention that what was done by the Railway Company by way of changing the position of the plank at the place of the accident, on the afternoon of the day and sometime after the accident, and what was said by the employe then making the repairs, as to the condition of the plank at the time of the accident, were not admissable as parts of the *res gestæ;* in addition to the authorities named in our opening brief (p. 5), we call your Honors' attention to

26 O. S., 185. R. R. Co vs. Mara.

10 Northeastern Rep., 790. Williamson vs. R'y Co. (Mass. Sup. Ct.).

119 U. S., 99 (103.) Vicksburg R. R. Co. vs. O'Brien. Suit was here brought for injuries received in a car being thrown from the track, and on the trial below it being material to show the rate of speed at the time of the accident, a witness had been permitted to narrate what the conductor of the train, within thirty minutes after the accident, said was the rate of speed at the time of the accident. The Court (p. 105) hold this evidence incompetent, as no part of the *res gestæ.*

Quoting from 20 Wal., 540, the Court say: "The reason "is that the agent to do the act is not authorized to narrate "what he had done or how he had done it, and his declaration "is no part of the *res gestæ.* * * * *
"It is true that in view of the engineer's experience and po-"sition his statement under oath, as a witness, in respect to "that matter, if credited, would have influence with the jury. "Although the speed of the train was in some degree subject "to his control, still his authority in that respect did not carry "with it authority to *make declarations or admissions at a*

"subsequent time as to the manner in which on any particular "trip, or at any designated point in his route he had per- "formed his duty."

In like manner we suggest that, although the opinion of the roadmaster, who came to alter the condition of the crossing a few hours after the accident, would be important and worthy of much credit to the jury, owing to his experience in such matters, if it were given under oath; yet his mere employment as agent of the R. R. Co., to oversee the putting down of planks at crossings, *did not carry with it authority to make declarations or admissions at a subsequent time, as to the manner in which, at this crossing at the time of the accident, he had performed his duty.*

We have, in our original brief (p. 7), said all that we think advisable regarding the charge of the Judge to the jury, that this remark of the roadmaster was not *binding* on the R. R. Co. We think it was still left with them for *some* purpose, it was not wholly withdrawn. They might consider it as the judgment of the roadmaster that the crossing was defective at the time of the accident, and as the Court remark in *119 U.S. p. 104*, (supra) regarding the incompetent statement of the engineer after the accident.

"The declaration" (of the roadmaster) "may have had a de- "cisive influence upon the result of the trial."

II.

Were the section foreman, and the plaintiff (a brakeman on a train) fellow servants?

Although we think we have shown error sufficient in the admission of incompetent evidence to furnish ground for a reversal of this cause, yet a more important error concerns the charge of the Court that "the section foreman" (who had charge of the condition of this crossing,) "was not a co-

laborer" (that is fellow servant) "with plaintiff" (Record p. 19), and therefore the plaintiff did not take the risk arising from his negligence.

In several of the cases quoted (e. g. 129 Mass. 268) by our learned opponent we are not inclined to find fault with the language of the Courts which define the duty of the master, "whether a natural person, or a corporation" as

"bound *to use reasonable care in selecting* his servants.....
"and in keeping the places and structures upon or over which
"his business is carried on, in a fit and safe condition."

But what are we to understand by "*reasonable care?*" Does it require such high degree of care as will *insure* the servant that no harm will arise from the negligence of any other servant, or from the accidental failure of machinery; or does it only require, that in matters where the master himself employs other servants with whom, or furnishes machinery or structures upon which an employee is to work, he shall exercise that degree of prudence and care which reasonably prudent men in like business do exercise with a view to secure success and safety in such business?

We understand the doctrine that puts upon a servant the risks that result from the negligence of a fellow servant to come as a corollory from the rule that requires reasonable care upon the master in employing other servants. When the master so does, the risk is on the servant.

We are aware that there are some cases like that cited by our learned opponent from *55 Vt. 84, Davis vs. R. R. Co.* holding that in a matter of furnishing machinery with which, or structures upon which a servant is to work, the master is practically an insurer of the safety of the servant whether he personally superintended the making of the machinery or structure, or employs some one or more persons in his place to look after and keep in order the machinery or structures. Whatever may be the degree of care required of an employer in regard to the

furnishing of machinery and structures for his servants to work with or upon, we are quite ready to assent to the rule that when an employer puts in his place a substitute to furnish such machinery and structures, the substitute must exercise the same degree of care which is required of the employer.

But when we come to enlarge the operations of an employer and introduce multitudes of servants to work for him under one who brings the judgment needed to determine plans and methods of construction which the subordinates are mechanically to put in force, as it is impossible for the employer personally to take the work of doing all the labor needed to prepare and keep in order all the machinery and structures with and upon which work is to be done, but it becomes necessary to commit to one wise and expert head of the department the devising of plans and methods most certain to secure safety, and to numerous subordinate servants the care over small portions of the machinery and structures to keep them in repair; and a servant who is employed knows that this necessity exists, is it reasonable to require not merely that the master shall exercise *reasonable care in the selecting* of such servants as are to look after and keep in order machinery and structures, but that he shall become an *insurer* to his servants, that no harm shall come from any mistake or carelessness of such subordinate employers? A corporation, or a master, can only act through persons representing it; and in a certain sense every employe in all his work represents the corporation. But it becomes a question to which courts of last report have given a great variety of answers, when does a servant, and especially a servant of a corporation, assume upon entering such service, the risks arising from the want of ordinary care or ordinary skill in other employés of the same corporation? We understand the answer

made by this honorable Court to be, when the servant injured and the servant causing by his negligence the injury are *fellow servants*. We then ask the further question, when are the employees fellow servants?

We find this question answered in the *119 U. S. 478. Randall vs. R. R. Co.*

And although the court cautions us that we are not to consider this "definition precise and exhaustive of the general rule"; yet, as it is the only one we have been able to find which this honorable Court has laid down; and further, as we think it reasonable and applicable to the case at bar we measure our own case by it.

Now the elements embraced in this definition so given are these—(*p. 483*):

1st. "The servants, the injured and the negligent one "are "employed and paid by the same master."

This is true of plaintiff, a brakeman on a train, and the section boss, King, who had the duty of keeping in repair the crossing in question.

2d. "The duties of the two being there to work at the "same place, at the same time; so that this negligence of the "one in doing his work may injure the other in doing his "work."

This holds good in the case at bar; for King, the section boss, had the duty to keep the crossing in order at the time when plaintiff received his injury there in exercise of his duty as a brakeman.

3d. "Neither works under the orders or control of the other." There is no pretense that this element of fellow service was wanting. When these elements exist we understand the court to state as a result—"Each by entering into "his contract of service takes the risk of the negligence of "the other in performing his service, and neither can main- "tain an action for an injury caused by such negligence, "against the corporation, their common master."

But the court below modified this definition, and your Honor are now requested to abide by such amendment, and declare, that in such matters as concern the keeping in order of a railroad track, the above rule of ordinary care on part of the corporation is not applicable; because it is said the master, the corporation is vicariously or otherwise present, in the employee who has the duty of keeping the track in repair, and his negligence becomes therefor the negligence of the master, the corporation. This reason proves too much; for every act by a servant of a corporation in its business is an act of the corporation; and this fact would shut out all risk of the negligence of a fellow servant.

We have already in our opening brief (p. 15) shown that by the rule in Ohio, *where this plaintiff entered into his contract with the R. R. Co.; a servant engaged in repairing the track is a fellow servant with one of the hands upon a train running on that track;* at least when he is *"the ox-gored."*

8. O. S., 251, Wheeler vs. R. R. Co.

If the rule sought to be here applied is to prevail we are in this condition; If this plaintiff is a citizen of the same state as the defendant R. R. Co., so that he is compelled to prosecute his claim in the state court, he fails to recover; but if he happened to be a citizen of another state, he steps into the Federal court and recovers with no difficulty. We are not ignorant that this court has repeatedly announced that in the application of general principles of commercial law, it will not be bound by the decisions of Courts of last resort in the state, where a contract was entered into; but it seems to us, that when this Honorable Court comes to interpret the rights belonging to a corporation as against its employes, the case comes more reasonably within the operation of a well known rule that this Honorable Court has frequently recognized,

"that in ascertaining the rights of parties to a controversy, "the law of the place where the right arises, governs."

105 *U. S.* 24. *The Scotland.*
8 *Pet.* 361. *B'k of U. S. vs Donnally.*
13 *Pet.* 65. *Andrews vs Pond.*

But if the question were entirely an open one, we think upon the best principles of logic and good sense, a *section boss*, who has charge of a few miles of a railroad to keep its track in repair, ought to be determined to be a fellow servant with a brakeman upon a train.

1st. It is plain that the brakeman when he entered the service of the R. R. Co. must have known the necessity of the employment of men, to have each the care of keeping in order the track for a few miles, so as best to further the objects of transportation; and the servant having the care of the track when he enters upon that service knows the necessity of the employment of brakemen upon every train, to control its speed so as not to subject trackmen to danger from the running of the train.

The corporation could not by the single person, its chief engineer, who has primarily all discretion in determining the conditions of safety in the track, keep up an oversight and repair of the whole track. That would be impossible.

The master of transportation could not by himself alone control the motion of all the cars in all the trains. Each of these chief officers, heads of departments, must have many inferior servants under him working for the common end.

Now, when each of these heads of departments makes contracts of employment with the subordinates of his department, what is the degree of care required to be exercised in such employment? We argue that inasmuch as he is the *first instance* of the corporation clothing itself in human agency—

and human agency is necessary for all its action—he may be held properly to *stand for and represent the corporation;* and his deficiency in such degree of care or skill as the law requires of a master towards his servant, will be negligence in the corparation.

And now we reach the important question, *what degree of care* is required of a master to provide for the safety of a servant who enters his employment? We are aware that the decisions say that if the servant is known by the master to be ignorant the master must be more careful than if he is known to be well informed of the danger himself; if the servant is young he must be cared for more diligently than if he is mature; but we are not aware that the rule generally adopted by the text books or by the courts makes the master an *insurer* or *warrantor* to the servant that he shall not meet with harm from the acts of those who are laboring in such relation to him that their carelessness may bring him harm.

This Honorable Court has not adopted the rule that the master is a *warrantor* or *insurer* of the servant against harm.

In *100 U. S. 213* (217) *Hough vs. R'y. Co.*, we find this principle, referring to protection of the servant:

"To that end the master is bound to observe all the care "which prudence and the exigencies of the situation require, "in providing the servant with machinery or other instru- "mentalities adequately safe for use by the latter. . . . "It is also implied that in selecting such means he shall not "be wanting in *proper* care."

This language is very far from laying upon the master the burden of an *insurer,* either regarding machinery or other servants furnished for the work; but especially is this language directed towards the furnishing of "machinery or other instrumentalities," including structures to work in or upon.

In *107. U. S. 454.* (459) R'y Co. vs. McDaniels, the Court

quote the rule above laid down in *100 U.S.217, Hough vs. R'y Co.* (supra) and add (p. 459).

"These observations as to the degree of care to be exercised "by a railroad corporation in providing and maintaining ma- "chinery for use by employees apply with equal force to the "appointment and retention of the employees themselves. " . . The decisions with few exceptions not important to be " mentioned are to the effect that the corporation must use " ordinary care." . . . . .

"Ordinary care, then—and the jury were in effect so in- "formed—implies the exercise of *reasonable diligence*, and "*reasonable* diligence implies as between the employer and "employe, such watchfulness, caution and foresight as under "all the circumstances of the particular service, a corporation "controlled by careful, prudent officers, ought to exercise."

Here then we have it distinctly decided that the *degree of care* required of a corporation in providing and maintaining in order machinery and other instrumentalities (including structures in or upon which a servant is to work) as well as employing other servants, is not the highest possible care, amounting to a warranty, but *"ordinary care"* suitable to the circumstances.

Now, having found the rule by which a corporation, in the person of its agent who stands at the head of any department is to be governed, let us put such agent at his duties subject to this rule, and work out a practical application of this rule. If he is in charge of a railroad track which is so short that he is able to look after it all himself, and see to buying and laying down the track with all its appliances and instrumentalities, and he uses *ordinary care* in all these duties, then by the rule above given the corporation fulfills its duty owing to the brakeman on the train that passes over the track. And if a brakeman, under such circumstances, receives an injury by the failure of a rail, he is without remedy against the corporation for it has fulfilled its duty regarding him.

Now let us extend the track from a few miles, which might

be cared for by the one person acting as the head of the department, so that it embraces hundreds of miles.

The head man still exercises the same skill which he before used in determining how the track shall be built and the methods for keeping it in order; but now it becomes necessary to employ numerous men, more or less, to do the manual work, each taking a few miles and caring for that portion under the rules which the head of the department has formulated. The law, as we have found above, requires the exercise then of "*ordinary care*" in the selection of the men who are to do this work; and when such ordinary care has been exercised, (and is continued so as to discharge men found incompetent and fill their places with others), then this corporation *fulfils its duty* under the rule above laid down in the protection of a brakeman who mans one of its trains; as completely fulfills its duty as in the case first supposed, where the head man was able personally both to devise methods and to apply them. Now in the enlarged business it is utterly impossible for him to do both in person and every brakeman entering the employ or remaining in the employ after he has once traveled over the hundred miles of track, knows it is *impossible* for the head man (be he the chief engineer or roadmaster, it matters not which one), to devise the methods and also apply them, which are essential to secure safety in running of trains. The brakeman knows that numerous men along the track are at work as section bosses, each having charge of a few miles and putting in application the methods ordered by such head man; and he consents, desires to work under such conditions.

And yet when the corporation has fulfilled its duty, through its head of the department by his exercise of such proper skill and care as the law requires, both in the procurement of material and in the selection of men to put it down

and keep it in order, it is claimed that the law is now *enlarged in its protection* of a brakeman and requires the corporation to become a *guarantor* or *insurer* of the brakeman that no harm shall come from the carelessness of these servants which have been selected with proper care—with such care as the law requires. It is a claim, that says, although the law only requires of you, the corporation, to exercise ordinary care in the selection of these servants to work in the common business in which a brakeman is engaged, towards the end of safely and successfully transporting goods and persons, yet now because some of the courts have said it is a duty of the master to furnish safe machinery and appliances, the court should make the corporation responsible for every and all negligence of such inferior workmen, when their labor is bestowed upon the track to keep it in order.

It seems to us such a contention is utterly in conflict with the fundamental principles which holds a servant to assume, upon entering an employment, such risks as he plainly knows pertain to such service; and as well in conflict with the doctrine that in the furnishing of its track and machinery, as well as employing other servants to aid, the duty to a particular servant is fulfilled in the exercise of *"ordinary care."*

It seems to us then that the logical position of the rule regarding the case which a servant has a right to require of his master when that master is a corporation, would be on the great preponderance of authorities and especially of the decisions of this Honorable Court—That

In the person of the officer who stands at the head of any department of its service, there is required the exercise of *ordinary care* suited to the great interests of life and property at stake, in all he does either in devising means and methods for machinery and structures or buying material for use in his department; and he is required to exercise the